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DEPARTMENT OF THE INTERIOR

FRANKLIN K. LANE, SECRETARY

BUREAU OF MINES

VAN. H. MANNING, DIRECTOR

ABSTRACT OF CURRENT DECISIONS

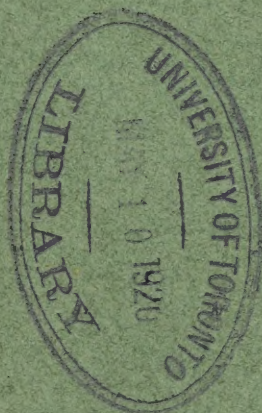
ON

MINES AND MINING

REPORTED
MAY-AUGUST, 1919

BY

J. W. THOMPSON



WASHINGTON
GOVERNMENT PRINTING OFFICE
1920

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ABSTRACTS OF CURRENT DECISIONS ON MINES AND MINING, MAY-AUGUST, 1919.

By J. W. THOMPSON.

MINERALS AND MINERAL LANDS.

MINERALS.

LIMESTONE DEPOSITS.

Limestone deposits that have not been demonstrated to be of such quality as to give them any substantial value over other limestone deposits of the same region, are not regarded as minerals.

Gray Trust Co., In re, 47 Land Decisions 18, p. 20.

OIL AS A MINERAL.

Oil is a mineral substance and its removal will greatly impair the value of the land from which it is removed.

Texas & Pacific Coal & Oil Co. v. Howard. ——— Tex. Civ. App. ———, 212 Southwestern 735, p. 737.

OIL AND GAS AS MINERALS—OWNERSHIP.

Oil and gas are minerals and so long as they remain in place they belong to the owner of the land under which they are found and such owner has the right to explore for the oil and gas on or under his land and when found to remove and possess the same.

Kimbly v. Luckey, — Okla. —, 179 Pacific 928, p. 931.

OWNERSHIP OF MINERALS—LACHES NO BAR.

The owner of minerals in land can not be barred by laches for failing to assert his ownership where his title had not been questioned and his right invaded. No lapse of time bars one's right to property and it is only in case his right has been invaded that it can be barred by laches.

Morse v. Smythe, 255 Federal 981, p. 984.

ORE CONCENTRATION—CONSTRUCTION OF PATENT—PROCESS AND NOT
RESULT PATENTED.

The court is concerned only with the five "fractions of one per cent claims," Nos. 1, 2, 3, 4, and 12, and the question presented relates only to the use of petroleum products, and are considered with respect to the amount and character of the oil prescribed. The first three claims declare that, so far as oil is concerned, the discovery consists in "adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter amounting to a fraction of one per cent on the ore." The fourth claim differs only in substituting the word "substance" for "liquid" in the first three. The twelfth claim provides for carrying out the process "with oil in water containing a fraction of one per cent of oil on the ore." The patent therefore makes no differentiation either in the claims or in the specifications among the oils having a preferential affinity for metalliferous matter and that its disclosure to which the patentees must be limited is that when a fraction of one per cent on the ore of any such oil is used in the manner prescribed there will be produced a metal-bearing froth, the result of the process. No notice is given to the public and it is nowhere particularly pointed out in the claims that some oils, or combination of oils, having a preferential affinity for metalliferous matter are more useful than others in the process or that some may be used successfully and some not or that some are "frothing oils," a distinction not appearing in the patent, and that some are not. The patentees discovered the described process for producing the result or effect, the metal-bearing froth, but they did not invent that result or froth; their patent is on the process and it is not and can not be on the result and the scope of their right is limited to the means they have devised and described as constituting the process.

Minerals Separation v. Butte & Superior Min. Co., 39 Supreme Ct. Rep. 496, p. 500.

CONTRACT OF CONVEYANCE—INTEREST IN LAND.

A contract of conveyance conveyed the minerals, mineral solutions and liquids, naming oil, gas, coal, iron, sulphur, lignite, asphalt, lead, zinc, gold, silver, mica, kaolin, barite, acmite, okenite, clays, and artesian waters in and under a certain described tract of land with the right to enter and mine the same. This was a conveyance of the minerals named in place and was a conveyance of an interest in the land described as the minerals named were a part of the realty.

Thomason v. Upshur County, — Tex. Civ. App. —, 211 Southwestern 325, p. 327.

CONVEYANCE BY COUNTY OFFICER—VALIDITY.

The commissioner's court of a county in Texas has no power to sell and convey the minerals in lands belonging to the county to a third person for a nominal consideration, and the development of the mineral resources of the land and the payment to the county of a certain per centum of the value of the mineral resources as might be developed. Such a contract is an attempt to convey an interest in the land for a consideration, in part at least, for other than money, thereby diverting a part of the sum from the purpose to which it was dedicated, and such a conveyance is void.

Thomason v. Upshur County, — Tex. Civ. App. —, 211 Southwestern, 325, p. 327.

ORE CONCENTRATION—SULMAN, PICARD & BALLARD PATENT—NATURE AND CONSTRUCTION.

The patentees of the Sulman, Picard & Ballard patent No. 835,120 came late into the field of ore-concentration investigation, and their discovery rests upon a prior art so fully developed that it was clear that approach was being made slowly but more and more nearly to the result which was reached by the patentees of the process in March, 1905, and their final step was not a long one. Such a patent in such a field of investigation must be construed strictly, but candidly and fairly, to give the patentees the full benefit, but not more, of the disclosure of their discovery, which is to become a part of the public stock of knowledge upon the expiration of the patent period, and which was the consideration for the grant to them of a patent monopoly.

Minerals Separation v. Butte & Superior Min. Co., 39 Supreme Ct. Rep., 496, p. 499.

ORE CONCENTRATION—PATENT—CONSTRUCTION AND LIMITATION.

The courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office. As patents are procured *ex parte* the public is not bound by them, but the patentees are; and they can not show that their invention is broader than the terms of their claims, or, if broader, they must be held to have surrendered the surplus to the public. The claim is a statutory requirement prescribed for the very purpose of making the patentee define precisely what his invention is, and it is unjust to the public, as well as an evasion of the law, to construe a patent in a manner different from the plain import of its terms.

Minerals Separation v. Butte & Superior Min. Co., 39 Supreme Ct. Rep., 496, p. 499.

ORE CONCENTRATION—SULMAN, PICARD & BALLARD PATENT—USE OF OIL—
SUBSTANCES AND QUANTITY.

The only disclosure as to the kind and amount of oil which the patentees in the Sulman, Picard & Ballard patent No. 835,120 made to the public as necessary to the purpose of their process is that it must be an oil or oily substance or oily liquid having a "preferential affinity for metalliferous matter," and that it shall be "limited in amount to a fraction of 1 per cent on the ore."

Minerals Separation v. Butte & Superior Min. Co., 39 Supreme Ct. Rep., 496, p. 500.

ORE CONCENTRATION—DIFFERENT OILS IN COMPOUND.

Petroleum products within the Sulman, Picard & Ballard patent No. 835,120, for process of ore concentration, are oils having a preferential affinity for metalliferous matter. It can not be assumed as against the admission of the patentees that 12 per cent of kerosene oil and 70 per cent of fuel oil were added to 18 per cent of pine oil in the preparation of a compound used in ore concentration solely to carry the content of oil beyond the prescribed fraction of 1 per cent on the ore for the purpose of technically avoiding infringement.

Minerals Separation v. Butte & Superior Min. Co., 39 Supreme Ct. Rep. 496, p. 498.

ORE CONCENTRATION—PER CENT OF OIL USED.

The use in the concentration of ores of a mixture made up of 18 per cent of pine oil, and the remainder of petroleum products or derivatives—12 per cent of kerosene and 70 per cent of fuel oil—and by the use of 30 pounds of this combination to a ton of ore, which would be 0.01 $\frac{5}{10}$ on the ore, does not infringe the claims of the Sulman, Picard & Ballard patent No. 835,120, which limits the oil to be used to a fraction of 1 per cent on the ore.

Minerals Separation v. Butte & Superior Min. Co., 39 Supreme Ct. Rep. 496, p. 497.

ORE CONCENTRATION—VARIATION OF ORE AND OILS—CERTAINTY OF
PATENT.

The specifications of the Sulman, Picard & Ballard patent No. 835,120 point out that the proportion of mineral which flows in the form of froth varies with different ores and with different oily substances used, and simple preliminary tests are necessary to determine what oily substance will yield the best results with each ore. But such variation of treatment must be within the scope of the claims of the patent, and the certainty which the law requires in patents is

not greater than is reasonable having regard to their subject matter. The process is one for dealing with a large class of substances, and the range of treatment within the terms of the claims, while leaving something to the skill of the persons applying the invention, is sufficiently definite to guide persons skilled in the art to its successful application, and this satisfies the law.

Minerals Separation v. Butte & Superior Min. Co., 39 Supreme Ct. Rep. 496, p. 497.

ORE CONCENTRATION—INFRINGEMENT OF PATENT.

This case involves the validity of the Sulman, Picard & Ballard patent No. 835120 and an infringement thereof by the Butte & Superior Mining Co. The chief controversy centered about the claim of infringement based upon the use of oil by the mining company in excess of 1 per cent on the weight of the ore. The patent relates to improvements in the concentration of ores, the object being to separate metalliferous minerals, graphites, and the like from gangue by means of oil, fatty acids, or other substances which have a preferential affinity for metalliferous matter over gangue. The patentees under a patent may claim a reasonable degree of variation within the terms of the claims 1, 2, 3, 4, and 12, in the amount of oil to be used and the application of their discovery in practice, and the restricting of the amount to a fraction of 1 per cent on the ore was reasonable and lawful.

Minerals Separation v. Butte & Superior Min. Co., 39 Supreme Ct. Rep., 496, p. 497.

ORE CONCENTRATION—INFRINGEMENT—PER CENT OF OIL USED.

The Sulman, Picard & Ballard patent No. 835120 for process of ore concentration in claims Nos. 1, 2, 3, 4, and 12 has "fractions of 1 per cent claims," and extends to and covers the use in the process of oil in amounts equal to any fraction of 1 per cent on the ore.

Minerals Separation v. Butte & Superior Min. Co., 39 Supreme Ct. Rep., 496, p. 497.

See *Minerals Separation v. Hyde*, 207 Federal 956.

Minerals Separation v. Miami Copper Co., 237 Federal 609.

Minerals Separation v. Miami Copper Co., 244 Federal 752.

Minerals Separation v. Hyde, 242 U. S. 261, 37 Supreme Ct. Rep. 82.

Minerals Separation v. Hyde, 245 Federal 577, 250 Federal 241.

MINERAL LANDS—SALE AND CONVEYANCE.

DEED CONVEYING MINERAL—EXTENT OF RIGHT CONVEYED.

A grantor by deed conveyed all his interest in a certain described tract of land excepting the part or tract he had previously sold by

written contract. This grant was sufficient to convey the mineral rights of the grantor in the portion of the tract described which he had previously contracted to sell to another but in which he had reserved the mineral rights.

Morse v. Smythe, 255 Federal 981, p. 982.

DEED RESERVING MINERALS—CONSTRUCTION.

A deed for certain described lands reserved and excepted therefrom the subterranean oil and minerals and the right to enter upon the lands to dig, bore, or mine for such minerals, paying to the grantees such damages as they might sustain by reason of such entry. The grantees upon the same day mortgaged to the grantor the land conveyed to secure the payment of a note thereafter to become due. Before the maturity of the note, the grantor executed to the grantees a quitclaim deed, referring to the mortgage and reciting that, whereas the grantees are desirous of having the land relieved from the operation of the mortgage and in consideration of the premises and the sum of \$1, he "remised, released, and forever quitclaimed to the grantees by name the aforesaid premises, and all the right, title, and interest, both in law and in equity which I have in and to the same." This instrument or quitclaim uses language necessary to convey both the legal and equitable interest of the owner and the parties so construed it, and this construction was not challenged for nearly 50 years. The grantor lived 21 years after the execution of this quitclaim, and during that period the grantees dealt with the property in all respects as their own. Before the grantor's death a purchaser of a part of the land from the grantees leased a part of the land for the express purpose of drilling, digging, boring, and removing petroleum oil and similar substances. Under these circumstances the quitclaim deed released not only the mortgage but also conveyed the reserved mineral rights.

MacFarland v. Walker, ——— Cal. App. ———, 181 Pacific 288, p. 250.

DEED RESERVING MINERALS—EFFECT AND EXTENT.

A deed conveyed to the grantee the surface of certain described lands as a part of a certain known addition under a survey, reserving the coal and mineral rights. Subsequently the grantor conveyed to another all the residue of the tract of land of the designated addition according to a plat prepared by a certain named person, but not to include any land in such survey or addition theretofore conveyed. Thereafter the grantee of the last-described tract conveyed to a coal company all the coal and other minerals underlying the tract

of land constituting the residue of the tract as surveyed. The deed to the grantor of the mineral rights by which was conveyed the residue of the tract in such survey did not and was not intended to convey the mineral interest theretofore reserved in the tract of the addition theretofore conveyed.

Byard Coal & Coke Co. v. Mitchell, 255 Federal 216, p. 217.

CONVEYANCE BY WARRANTY DEED—AFTER-ACQUIRED TITLE—ESTOPPEL.

A tenant in common sold and conveyed by warranty deed all the minerals, coal oil, rock carbon, or other oils, salt water, or any or all other valuable minerals except coal, under the lands of the grantor as described. At the time of the execution of the deed the grantor owned but a one-half interest in the lands described, but there was an oral agreement from the other tenant in common for an exchange of their several interests and by which the grantor was to acquire the full title to the land described and a conveyance of the other interest was subsequently made to the grantor in the deed conveying the mineral right. This subsequent title when acquired by deed enured to the grantee in the mineral deed and perfected his title as against the grantor or any subsequent conveyance made by him.

Hays v. Lackey. ——— Ky. ———, 213 Southwestern 205, p. 206.

OPTION CONTRACT TO PURCHASE—FRAUDULENT DECREE—EFFECT ON PURCHASER.

An option contract for the purchase of mineral lands was obtained pending litigation over the land but prior to the judgment. If the judgment was entered by agreement or was a fraud upon the purchaser's rights and was in fact collusive, it can not prevail over whatever rights the purchaser obtained under his option contract of purchase.

Crawford v. Williams, ——— Ga. ———, 99 Southeastern 378, p. 381.

LEASE NOT A CONVEYANCE.

A state mining lease under the statute of Minnesota is not a conveyance of ore in place but it is in fact as it is in form a lease and no more.

State v. Cavour Min. Co., ——— Min. ———, 173 Northwestern 415.

See State v. Evans, 99 Minn. 220, 108 Northwestern 958.

Boeing v. Owsley, 122 Minn. 190, 142 Northwestern 129.

State v. Royal Mineral Ass., 132 Minn. 232, 156 Northwestern 128.

Von Baumbach v. Sargent Land Co., 242 Federal 503.

United States v. Biwabik Min. Co., 247 Federal 116, p. 124.

GRANTEE OF SURFACE—ESTOPPEL TO DENY GRANTOR'S TITLE.

A deed conveyed to the grantee the surface to a certain described tract of land, but reserved to the grantor the minerals therein. Under such a deed the grantee and those claiming under him are estopped to deny the title of the grantor and those claiming under him to the minerals so reserved.

Morse v. Smythe, 255 Federal 981, p. 982.

CONSIDERATION—AGREEMENT TO DEVELOP AND PAY ROYALTIES.

The owner of certain mining property conveyed for the use of the grantees the mining property described in the deed. The consideration of the conveyance was that the grantees were to take possession of the mine for the purpose of prospecting and drilling the same to the satisfaction of all the parties; and if minerals were discovered the grantees were then to work and pay a stipulated part of the net profits derived from the working of the mine. The sole consideration for the purchase price took the form of a royalty resulting from the working of the mine and there was an implied obligation on the part of the grantees to work the mine to the end that the consideration might be paid and failing in this the grantor might have the property restored to himself, and under such circumstances the grantor had the right to have the conveyance forfeited.

Sledge v. Stolz, — Cal. App. —, 182 Pacific 340, p. 344.

AGREEMENT TO DEVELOP—PAYMENT OF ROYALTIES—FORFEITURE.

The owner of a mining claim conveyed the same by deed to a grantee under an agreement that the grantee was to perform the assessment work and to prospect and work the claim and to pay the grantor a certain specified per cent of the net profits derived from the working of all mineral bearing earth. The sole consideration for the deed was an agreement to develop the mining claim and the payment of royalties. The obligation to work the mine was therefore a condition of the deed and on the failure of the grantee to operate the mine and a substantial breach of such implied condition the grantor had the right to reenter and claim a forfeiture of the conveyance.

Sledge v. Stolz, — Cal. App. —, 182 Pacific 340, p. 344.

PARTITION—SALE—DIVISION OF PROCEEDS.

A petition for partition of mineral land by certain of the coowners alleged that the minerals were not susceptible of division in kind without impairing the value of the whole property and of the com-

plainants' interest therein. Under the statute of Kentucky a vested estate in real property jointly owned by two or more persons may be sold by an order of a court of equity and under the code the complainants were entitled to a sale of the mineral property and a division of the proceeds according to the respective rights of the joint owners.

Kentucky Fluorspar Co. v. Pierce, — Ky. —, 213 Southwestern 542, p. 544.

SURFACE AND MINERALS—OWNERSHIP AND SEVERANCE.

PARTITION OF MINERAL RIGHTS—SALE.

An actual division of a mine can rarely be made without doing a possible injustice to some of the cotenants, and generally partition proceedings must result in a sale of the property and a division of the proceeds. But a sale of a mine can not be ordered in a partition suit except in cases where a partition would be manifestly injurious to the interests of the cotenants. Generally, land should be partitioned in kind unless the partition can not be made without prejudice to the owners. Where mines have not been opened a partition of land having upon it solid minerals will be decreed unless the minerals are so situated that a probable fair division of them can not be made by dividing the surface of the land. All things being equal as between a partition and a sale, partition will be decreed.

Kentucky Fluorspar Co. v. Pierce, — Ky. —, 213 Southwestern 542, p. 543.

COAL AND COAL LANDS.

CONVEYANCE BEFORE PATENT—TITLE—ESTOPPEL.

A coal-land entryman, after filing his declaratory statement, conveyed the land for a valuable consideration before completing the entry. Under an agreement with the purchaser he afterwards completed the entry, obtained a patent, and delivered it to the purchaser. Under these facts the entryman was in no position to assert that there was fraud or illegality in the proceedings through which he acquired the patent and his grantee who was not an innocent purchaser for value is in no better position.

Ketchum v. Pleasant Valley Coal Co., 257 Federal 274, p. 276.

OPTION TO PURCHASE—AGREEMENT TO EXTEND—CONSIDERATION—BREACH BY VENDOR.

The owner of certain coal lands gave to another an option to purchase. Before the expiration of the option the vendor agreed to extend the option in consideration that the optionee report the drillings

made on the land. Before the expiration of the extension and before the optionee had reported the drillings made the vendor gave notice that he would not abide by the option. His refusal was not based upon any failure of the optionee to perform the conditions stated, and under these facts the optionee was entitled to specific performance without a strict compliance with the conditions on which the extension of the option was made.

Starr v. Crenshaw. ——— Mo. ———, 213 Southwestern 811, p. 815.

OPTION TO PURCHASE COAL LANDS—CONSIDERATION FOR EXTENSION.

The owner of certain coal land gave to another an option to purchase the same, the option to extend to a certain date. Subsequently the owner agreed to extend the option for a year on condition the optionee give him a certified report of the drillings made upon the coal lands, and that the optionee pay interest on all deferred payments from a certain date in the event that he exercised the option. These conditions when substantially performed constituted a sufficient consideration for the extension of the option, and the owner could not then withdraw the option before the expiration of the extended time.

Starr v. Crenshaw. ——— Mo. ———, 213 Southwestern 811, p. 814.

RIGHT TO MINE—EASEMENT—FAILURE TO EXERCISE.

There may be an extinguishment of an easement to mine coal in place by an actual abandonment continuing for upward of 33 years.

McClure v. Monongahela Southern Land Co., — Pa. —, 107 Atlantic 386, p. 387.

EASEMENT TO MINE COAL NOT REVIVED ON SEPARATION OF ESTATES.

Where an easement to mine and remove coal in place had been abandoned by the original owner of the right, the subsequent separation of the ownership of the estates did not revive the easement previously extinguished.

McClure v. Monongahela Southern Land Co., — Pa. —, 107 Atlantic 386, p. 388.

UNION OF DOMINANT AND SERVIENT ESTATES—EXTINGUISHMENT OF EASEMENT.

The merger of a dominant and servient estates extinguishes an easement to mine and remove coal in place.

McClure v. Monongahela Southern Land Co., — Pa. —, 107 Atlantic 386, p. 388.

OIL AND OIL LANDS.

NATURE OF OIL AND GAS.

The fact that oil and gas are vagrant and transitory in their nature does not prevent them from adhering to and becoming part of the land while passing from one tract to another. Oil and gas while in a tract of land are a part thereof and belong to the owner of the land until they escape therefrom, but if brought to the surface and reduced to possession before such escape, they become the personal property of the owner of the land.

Kimbley v. Luckey. — Okla. —, 179 Pacific 928, p. 931.

PREVENTION OF WASTE—AUTHORITY OF CHIEF MINE INSPECTOR.

The constitution of Oklahoma does not expressly or by necessary implication confer upon the chief mine inspector jurisdiction to enforce the act of 1915 (Session Laws, 1915, Chs. 25 and 197), enacted to conserve and prevent the waste of crude oil and natural gas and to regulate the equitable taking of oil and gas from a common source of supply and the equitable purchase of natural gas by common purchasers thereof. The constitution does not impose any duties in relation to either of such acts to be performed exclusively by the chief mine inspector.

Love v. Boyd. — Okla. —, 180 Pacific 705, p. 708.

CONTRACT OF SALE—SPECIFIC PERFORMANCE—DEED OF CORPORATION.

A vendee under a contract for the purchase of oil and gas lands brought suit for specific performance. In order to justify the appointment of a special receiver for the purpose of operating an oil well on the property the plaintiff must show a clear right to the property itself. But the proof is sufficient where the conveyance was by the deed of a corporation executed and delivered by its president and secretary in due form, as it will be presumed that the officers had authority to execute the deed.

Lawrence v. Montgomery Gas Co., — W. Va., —, 99 Southeastern 496, p. 499.

CONVEYANCE OF PART OF LEASED LANDS.

An oil lease covering a tract of land extended its conditions and agreements to the "heirs, executors, administrators, successors, and assigns of both parties." This implied that the leased lands might be subdivided. On the purchase of a portion of the leased premises by a third person before the production of oil or gas thereon, each owner was entitled to the profits and royalties arising and accruing

from the oil and gas produced on his tract free of any claim or demand of the others.

Kimbley v. Luckey, — Okla. —, 179 Pacific 928, p. 931.

SALE—CONVEYANCE WITH WARRANTY—EFFECT ON OIL AND GAS.

The statute of Oklahoma (Revised Laws, Sec. 1162), provides that a warranty deed made in substantial compliance with the statute shall convey to the grantee the whole interest of the grantor in the premises described and this includes the right to oil and natural gas that may be found underneath the premises granted or by drilling thereunder.

Kimbley v. Luckey, — Okla. —, 179 Pacific 928, p. 930.

PURCHASE—INADEQUACY OF PRICE—TIME FOR FIXING VALUE.

The proper time for judging of the value of land as to the inadequacy of the price to be paid was when the purchaser or lender was considering whether to invest his money, and not after it had acquired a value of \$100,000 as a result of the discovery of oil.

Butler v. Marston, 145 La. —, 81 Southern 749, p. 751.

RESERVATION OF OIL—IMPLIED COVENANT TO DEVELOP.

A contract was entered into by which the contractor was to obtain title in his name to 1,600 acres of land within a certain section, title to remain in the contractor until the contract was completely performed. When title was obtained the contractor agreed to execute and deliver to the contractee an oil and gas lease on 500 acres of the land for a period of fifteen years or so long as oil or gas was produced from the premises. Other contracts were entered into and conveyances made by which the title to the land was more or less involved. By a subsequent contract for the purpose of adjusting the respective rights of the parties in the land and to enable the original contractor to obtain a merchantable title to the fee, the original contractee made certain conveyances but reserved for fifteen years the oil and gas under the lands purchased. The primary purpose of this reservation was not the payment to the contractor of royalties from oil and gas to be found thereon but to adjust the respective rights of the parties in the land, and there was therefore no implied covenant to develop the premises within a reasonable time, as production and payment of royalties were not the moving considerations for the making of the contract.

Kroeger v. Martin, — Okla. —, 180 Pacific 955, p. 957.

PARTITION—ALLOWANCE FOR IMPROVEMENTS FOR PRODUCTION OF OIL.

In an action by cotenants for the partition of land subject to an oil lease, the cotenant in possession must account for the value of oil produced, and marketed from the premises; but the fair value of the necessary and proper permanent and lasting improvements placed upon the land to develop it for oil by the tenant in possession must be allowed to him from the funds arising from royalties of the oil sold from the entire property.

Miller v. Powers, — Ky. —, 212 Southwestern 453, p. 456.

PERMIT UNDER TEXAS STATUTE—SURVEY.

The statute of Texas (General Laws 1913, chap. 173) authorizes the land commissioner to issue permits to prospect for oil and gas upon "surveyed lands." Where an application was made for a permit as to a certain designated area and the land commissioner caused the area to be surveyed, but the applicant failed to complete his application, a second permit on proper application for the same lands may be issued without a resurvey, as the lands were then "surveyed lands" within the meaning of the statute. Under these facts a third applicant could not compel the land commissioner by mandamus to issue to him a permit on the same area.

Sibley v. Robison, — Tex. Civ. App. —, 212 Southwestern 932, p. 933.

PROMISE TO PROSPECT—SURVEYED LANDS.

On an application for a permit under the act of 1913 to prospect for oil and gas upon land belonging to the State the area was lawfully surveyed and the field notes duly filed in the Land Office, but no permit was issued at the time. Subsequently an application was made and the area was treated as surveyed land within the meaning of the statute. A resurvey of the area was not required, and, as the permit was lawfully issued and was filed, the land commissioner could not be compelled by mandamus to issue another permit on the same surveyed area.

Sibley v. Robison, — Tex. Civ. App. —, 212 Southwestern 932, p. 933.

LEAKING OIL—ABATABLE NUISANCE—DAMAGES.

Oil escaping from a pipe line flowed over the complainant's lands, destroying the grass and vegetation and killing his live stock. The evidence showed an injury to the products of the soil by a continuing abatable nuisance and damages can be recovered only to the date of the action, as the presumption is that the cause producing the injury

will be removed by an abatement of the nuisance. If the nuisance is not abated, it is continuous, resulting in damages, is a new and separate injury, which gives rise to a new cause of action and successive actions may be maintained so long as the nuisance is permitted. The measure of damages in such an action is the depreciation in the rental value of the real estate affected.

Indiana Pipe Line Co. v. Christensen, — Ind. —, 123 Northeastern 789, p. 790.

OIL—DAMAGES FOR INJURIES—SINGLE ACTION.

In an action by a landowner for damages resulting from his land being flooded with oil that escaped from a pipe line, the evidence showed that crude oil has a harmful effect on certain things and that it will kill vegetation; that the crops growing on the land were injured and that stock of the landowner was injured and some killed as a result of oil swallowed in eating grass and drinking water. In such an action the recovery must be limited to damages resulting to the land from the oil permitted to flow thereon prior to the commencement of the action, and the entire damages must be recovered in a single action, as the wrongful act could not be treated as a continuing nuisance.

Indiana Pipe Line Co. v. Christensen, — Ind. —, 123 Northeastern 789, p. 793.

OIL INSPECTION.

AUTHORITY TO ADMINISTER INSPECTION LAW.

The authority and duties in reference to the inspection of oils and liquid products of petroleum manufactured or offered for sale for illuminating, heating, and power purposes, the conservation of oil and gas, drilling and operating oil and gas wells, and plugging abandoned wells, are, under the act of 1917 (Session Laws, 1917, ch. 207), under the jurisdiction and supervision of the Corporation Commission and the duly appointed and acting oil and gas conservation agent in charge of the oil and gas department of the Commission.

Love v. Boyle, — Okla. —, 180 Pacific 705, p. 709.

INSPECTION AND TEST—STATUTE REGULATING.

Section 2505 (Iowa Code Supp. 1913), fixes 100 degrees flash test as the standard for illuminating oil. Section 2508 of the same statute fixes the standard at 105 degrees thus making a clear conflict between the provisions of the two sections. These sections were carried into the code supplement from prior statutes but the act of 1911 amended

section 2505 by striking out the test figures 105 degrees and inserting in lieu thereof the figures 100 degrees. Section 2505 is therefore the later enactment and must control and an inspector is required to approve and so brand oil meeting the 100-degree test. The brand of approval has no function except as a declaration that the oil met the legal standard.

Way v. S. L. Collins Oil Co., — Iowa —, 173 Northwestern 20, p. 22.

STATE INSPECTION LAWS—CONSTRUCTION AND VALIDITY.

A State may pass proper inspection laws for oils brought into its borders in interstate commerce. But a State may not impose burdens upon interstate commerce in the matter of oil inspection.

Standard Oil Co. v Graves, — Wash. —, 39 Supreme Ct. Rep. 320, p. 321.

STATE LAWS—CONSTRUCTION AND VALIDITY.

The Washington oil inspection law (Laws, 1905, p. 310) and the amendatory acts authorized an inspection of all oils and other volatile products of petroleum shipped into that State by a State officer and provided a schedule of fees to be paid for the inspection. Under this act from 1905 to 1914 the receipts from the inspection of oil shipped into the State amounted to \$335,776.30. The total cost of the inspection was \$80,103.37, leaving a net revenue to the State over and above the expenses of administering the act during such years of \$255,672.93. A State can not impose burdens upon interstate commerce, and if the inspection fees imposed are disproportionate to the services rendered, or if they include the cost of something beyond legitimate inspection to determine the quality and condition of oil, the act must be declared void, because such costs by necessary operation obstruct the freedom of commerce among the States. The inspection fees required by the act to be paid before an importer could sell his importation, as shown by the revenue yielded, were grossly in excess of the cost of inspection and to the extent to make the act in conflict with the Federal Constitution.

Standard Oil Co. v. Graves, — Wash. —, 39 Supreme Ct. Rep. 320, p. 321.

See Pure Oil Co. v. Minnesota, 248 U. S. 158, 39 Supreme Ct. Rep. 35.

General Oil Co. v. Crane, 209 U. S. 211, 28 Supreme Ct. Rep. 475.

Bartels-Northern Oil Co. v. Jackman, 29 N. Dak. 236, 150 Northwestern 576.

Castle v. Mason, 91 Ohio State 296, 110 Northeastern 463.

CORPORATION COMMISSION—POWERS AND DUTIES.

There is nothing in the constitution of Oklahoma requiring that the duties imposed on the Corporation Commission by the act of 1915

(Session Laws 1915, Chaps. 25 and 197), should be performed by the chief mine inspector and there is nothing therein which limits the power of the legislature to transfer the other duties originally imposed by statute on the office of inspector of mines, oil and gas, to some agency of the State.

Love v. Boyle, — Okla. —, 180 Pacific 705, p. 711.

TRANSFER OF AUTHORITY AND DUTY.

The constitution of Oklahoma (Art. 25, Sec. 13), imposed the duties of territorial oil inspector on the chief mine inspector only until otherwise provided by law. There is no express or implied constitutional limitation on the power of the legislature to take from the chief mine inspector and transfer to some other officer or department the jurisdiction and duty to inspect oils and other liquid products of petroleum known as burning oil or kerosene or gasoline manufactured or offered for sale for illuminating, heating, and power purposes.

Love v. Boyle, — Okla. —, 180 Pacific 705, p. 710.

SUPERVISOR OF OIL INSPECTION—APPOINTMENT.

The Legislature of Indiana has power to create the office of State supervisor of oil inspection and a person duly appointed and in possession of the office is entitled to enjoin another person from interfering with the duties of the office until such person has established his title in an action at law.

Felker v. Caldwell, — Ind. —, 123 Northeastern 794, p. 795.

INSPECTION AND CONTROL—TRANSFER TO CORPORATION COMMISSION.

The statute of Oklahoma (Session Laws 1917, p. 385), takes the jurisdiction and duty to inspect oil and liquid products of petroleum from the chief mine inspector and confers that power upon the Corporation Commission. The commission, with the approval of the governor, was authorized to appoint oil inspectors to perform the duties of inspection. The act authorizes the Corporation Commission to create and establish an oil and gas department under its jurisdiction and supervision, with the consent of the governor, to appoint a chief oil and gas conservation agent who shall have charge of the oil and gas department. The authority theretofore conferred upon other departments in reference to the conservation of oil and gas and control and operation of oil and gas wells and the construction and regulation of oil and gas pipe lines was conferred exclusively upon the Corporation Commission. The duty of supervising and plugging dry and abandoned oil and gas wells was taken from

the chief mine inspector and given to the Corporation Commission under regulations to be made by it.

Love v. Boyle, — Okla. —, 180 Pacific 705, p. 707.

INSPECTION—PROOF OF TEST.

In an action by a wife against a dealer in kerosene for damages for injuries caused by an explosion of kerosene proof of tests made by a competent person is admissible and it was competent to prove that the husband of the injured plaintiff furnished the sample of the kerosene to be tested and informed the person making the test that it was from the same stock or can as was the kerosene that exploded.

Way v. S. L. Collins Oil Co., — Iowa —, 173 Northwestern 20, p. 22.

NATURAL GAS.

DUTY TO SUPPLY GAS—PAYMENT IN ADVANCE—REGULATIONS.

A natural gas company supplying the citizens of a city or district with gas was required to supply all patrons without partiality or discrimination and may enforce a regulation requiring payments in advance in reasonable amounts or require deposits of security. The general rule is that public service corporations furnishing gas or other public service may require that charges shall be paid for a reasonable term in advance.

Collins v. Miami County Gas Co., — Kan —, 180 Pacific 769, p. 770.

CONTRACTS TO SUPPLY—CANCELLATION PROCURED BY FRAUD—LIABILITY.

A natural-gas company entered into a contract with a roofing-tile manufacturer by which it agreed to supply the manufacturer with gas for all purposes in the operation of his plant at 3 cents a thousand cubic feet for a stated term and 4 cents for an additional term. After supplying the gas under its contract for something over two years the company entered into a conspiracy with another natural-gas company to fraudulently represent to the manufacturer, in order to induce him to cancel the contract, that the supply of gas had failed, thereby inducing the signing of a new contract at 7 cents per thousand cubic feet subject to cancellation on 30 days' notice. While operating under this second contract the supply of gas was intentionally kept inadequate by the company fraudulently keeping in the supply line a cock partly closed, the scheme being to compel the manufacturer to pay the domestic rate of 20 cents a thousand. The manufacturer, in order to obtain gas for his factory, was finally compelled to pay the domestic rate of twenty cents per thousand

cubic feet. On the discovery of the fraud in an action for damages by the manufacturer, the gas company was held liable for the differences between the original contract price and the amounts paid by the manufacturer under the two subsequent contracts procured by reason of the fraud.

Ludowici-Celaden Co. v. Coffeyville Gas & Fuel Co., — Kan. —, 180 Pacific 190, p. 191.

WASTE PREVENTED—STATUTORY REGULATIONS.

The Act of 1915 (Session Laws 1915, p. 398), makes unlawful the production of natural gas in such manner and under such conditions as to constitute waste, defines waste, and provides that when natural gas in commercial quantities, or gas bearing stratum known to contain natural gas in such quantities is encountered in a well, it shall be confined to the original stratum until it can be produced and utilized without waste, and all such strata shall be adequately protected from infiltrating water. The act regulates the taking of natural gas when the supply is in excess of market demands and purchasers of such gas are prohibited from discriminating in favor of one producer against another or in favor of one source of supply as against another. The Corporation Commission is given authority and power to conduct hearings and make regulations for the prevention of the waste of natural gas. The act provides that nothing therein contained shall interfere with any duties imposed by law on the chief mine inspector.

Love v. Boyle, — Okla. —, 180 Pacific 705, p. 707.

INSTALLMENT OF METERS—DEPOSIT OF SECURITY—DISCRIMINATION.

A natural gas company may establish and enforce a rule requiring all persons who desire to have a gas meter installed to deposit a reasonable amount for the instalment of the meter. The fact that a deposit had not been required of persons who had meters installed and their premises connected with the pipe lines previously to the time the rule was established and enforced does not render the application of the rule discriminatory.

Collins v. Miami County Gas Co., — Kan. —, 180 Pacific 769, p. 770.

ODORLESS GAS—JUDICIAL KNOWLEDGE.

A court can take judicial notice of the common fact that natural gas in a certain field has been considered to have no odor.

Hahn v. Southwestern Gas Co., 145 La. —, 82 Southern 199, p. 201.

INTERSTATE COMMERCE.

The transportation of natural gas from one state to another is interstate commerce.

West Virginia & Maryland Gas Co. v. Towers, — Md. —, 106 Atlantic 265, p. 267.

See West v. Kansas Natural Gas Co., 221 U. S. 229, 35 L. R. A. (N. S.) 1193.

NATURAL GAS—LOCAL REGULATION—ORIGINAL PACKAGE DOCTRINE.

Natural gas can not be said to be the subject of interstate commerce so as to prevent regulation by state laws where it is transported from one state to another in a high-pressure pipe line and where before reaching the consumers the pressure is reduced by regulators and it is carried through the streets of a town or city in low-pressure lines and the pressure is again reduced before it enters the private service lines of the consumers. Under such circumstances the "original package" doctrine can not apply.

West Virginia & Maryland Gas Co. v. Towers, — Md. —, 106 Atlantic 265, p. 268.

See State v. Flannelly, 96 Kans. 372, 152 Pacific 22.

Pennsylvania Gas. Co. In re, 184 App. Div. 556, 172 New York Supp. 1028.

Landon v. Public Utilities Comm. of Kansas, 242 Federal 658.

Landon v. Public Utilities Comm., etc., 249 U. S. 236.

OIL AND GAS WELLS.

CONTRACT FOR DRILLING—COMPLIANCE WITH CONDITIONS—RIGHTS AND LIABILITIES.

A driller by a contract was to drill an oil well 2,000 feet deep for a certain stated compensation and on failure to do so he should be entitled to no compensation. The work was to be done in a good workmanlike manner and there should be a "good, clean hole to the stated depth." The landowner was to furnish and deliver at the well site all piping necessary for the completion of the well. During the process of drilling there was a cave-in in the well and this cave-in could have been protected by the use of smaller pipe than that used and the reduction in the size of the hole. The landowner refused to furnish the smaller piping and refused to permit the reduction of the hole. There was nothing to show that this cave-in was the cause of the inability to finish the well; but the failure to complete the well and make a good, clean hole was due to the fact that a piece of pipe was stuck in the well and could not be passed and the cave-in was below the pipe that obstructed the well. The landowner was justified under the contract in refusing to furnish a smaller pipe, thereby reducing the size of the hole, and his alleged failure to furnish pipe being in no way responsible for the driller's failure to furnish a

good, clean hole did not make him liable to pay the agreed compensation.

Bain v. White, 256 Federal 428, p. 433.

CONTRACT TO DRILL—"GOOD, CLEAN HOLE."

A contract to drill an oil well provided that it should be completed to the depth of 2,000 feet and "shall be a good, clean hole." When the well reached the contracted depth a piece of pipe had been left in such condition that either the withdrawal of the drill stem or the mere lapse of a short period of time would result in the hole being obstructed by the pipe. By a "good, clean hole" is not to be understood one which is free from mud, but one which is free from those things the presence of which would render the hole incapable of the uses for which it was designated. Under these circumstances when the well was tendered by the driller for measurement the conditions were such that it did not meet the requirements of the contract.

Bain v. White, 256 Federal 428, p. 432.

CONTRACT TO DRILL—BREACH—RIGHT TO DRILL NEW WELL.

A driller by contract was to drill an oil well 2,000 feet deep and to furnish the landowner a good, clean hole for a stipulated consideration, but on failure to do so was to receive no compensation. The contract gave the driller an option to use an incompleated well drilled to two-thirds of the depth but abandoned because of obstacles that could not be overcome. Under the contract the landowner was to furnish at the well all piping necessary for the completion of the well. The driller exercised his option to use the old well and did drill to the required depth but could not furnish a "good, clean hole." After much delay and after more than 18 months after the signing of the contract the driller offered to construct a new hole and complete a well as required by the contract. The landowner consented to the driller making a new hole but refused to furnish pipe for the same. Having furnished pipe for the well that was drilled, and on the failure of the driller to complete it according to contract, he could not be compelled to furnish pipe for a second well and on failure to do so to be made liable for the drilling of the unfinished well.

Bain v. White, 256 Federal 428, p. 435.

CONTRACT TO BORE OIL WELLS—CONSIDERATION—EXTRA WORK—LIABILITY.

An oil-well driller undertook to drill an oil well to a depth of 2,800 feet at \$2 a foot. Under the contract and by direction of the com-

pany the well was drilled to a depth of 3,000 feet and the drilling abandoned. The driller was to furnish everything necessary to drill and complete the well except the rig, fuel, water, and casing and underreamers. In an action by the driller to recover on the contract he was held entitled to recover for 15 days' underreaming pursuant to an outside agreement for which the company had agreed to pay \$30 a day.

Wolverton v. Eldorado-Harper Emporial Oil & Gas Co., — Kan. —, 150 Pacific 792.

CONTRACT TO DRILL WELL—ABANDONMENT BY OWNER—LIABILITY.

An oil-well driller agreed with a landowner to bore a well for the purpose of obtaining petroleum, natural oil, or gas. He was to receive \$1,000 for the first 600 feet and \$1 per foot for any depth thereafter not to exceed 1,600 feet. The landowner reserved the right to stop the boring and accept the well as completed at any time if water was found. The payments were not to be made until the well was cleaned out and the prescribed casing put in; but if the well was not accepted by the landowner at any point and if he should abandon it entirely the driller was to draw the casing and plug the well and payment should then be made. Under this contract the landowner had the right to accept or reject the well at any depth and if accepted it was the driller's duty to put in casing, or if abandoned it was his duty to draw the casing and plug the well. The contract did not give the landowner the right to partially abandon the well after it had reached a depth of over 1,500 feet and require the driller to plug it at a point 1,000 feet below the surface and to make it a complete well to that depth.

Clarke v. Blue Licks Springs Co., — Ky. —, 213 Southwestern 222, p. 224.

CONTRACT OF DRILLING—INJURY TO WELL—RECOVERY.

A driller employed to drill an oil well for one dollar per foot, and to receive \$25 a day for cleaning out and any extra work done after the well was drilled, such as shooting, cleaning out, and pumping, is not to be denied a recovery under the contract because after the well was completed the oil company as the owner employed a torpedo company to shoot the well, and while preparing the shot a servant of the torpedo company negligently caused a wire to fall into the well, rendering it useless and causing its abandonment.

Gates v. Little Fay Oil Co., — Kan. —, 181 Pacific 570.

Gates v. Little Fay Oil Co., — Kan. —, 182 Pacific 184.

CONTRACT TO DRILL WELL—PROOF OF PERFORMANCE.

A contract provided that an oil well should be sunk to a depth of 2,000 feet unless a flow of oil, gas, or water was secured before that depth was reached. The contract provided that an incomplete well could be used if desired, and provided for certain compensation with the condition that if the driller failed to sink the well to a depth of 2,000 feet it should be a breach of the contract and he should be entitled to no compensation. The work was to be done in a good workmanlike manner, and the contract expressly stated that the well when completed to a depth of 2,000 feet "shall be a good clean hole." There was no provision for the measurement of the well, but there was an implied obligation that upon the completion of the work or on the claim that the work was completed the driller should make a reasonable showing of the truth of his claim. The landowner was not expected to pay the driller \$19,000 for a clean hole 2,000 feet deep without some evidence that the hole was that deep and that it was clean. He was not compelled to rely upon the mere statement of the contractor. The driller understood that he was to make a delivery to the landowner of a good clean hole 2,000 feet deep and that he was to demonstrate to the landowner the depth and character of the hole before the well was to be accepted and paid for.

Bain v. White, 256 Federal 428, p. 432.

COMMON POOL—OWNERSHIP—WASTE PREVENTED.

Oil and gas is the common property of the owners of the several tracts of land above it, and one landowner may be enjoined and restrained from wasting the gas, even though his doing so was for him a useful purpose in lifting oil to the surface. The rights of the several owners of a gas field are coequal, and one owner can not exercise his own right so as to preclude his neighbor from exercising his or so as to interfere with the neighbor.

Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. —, 82 Southern 206, p. 212.

OWNER MAY PREVENT TAKING OIL FROM UNDER HIS LAND.

A landowner may save fugitive oil from being drawn from under the surface of his own land if he can do so by some mechanical means which does not interfere with the rights of adjoining landowners to draw off the oil under their respective lands.

Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. —, 82 Southern 206, p. 212.

USE OF PUMP—OWNERSHIP OF OIL.

A landowner can not contest the right of an adjoining landowner to get out of his land all of the oil he possibly can by means of a well, nor can he contest the landowner's right to use pumps in obtaining the oil from a well on his own land. There is no difference between a well and a pump, both are artificial; both cause the oil to flow from the land; and both produce that effect by creating a vacuum which the oil from adjoining lands comes into to fill. In both cases the oil flows from the adjoining land by gravity and the fact that some of the oil produced by a pump may come from adjoining land can make no difference, for in the case of a flowing well so close to the boundary line that one half of its product would to a reasonable certainty be known to be coming from the adjoining land the owner of such tract would hardly claim either the ownership of such one half of the oil or the right to close the well. The reason of this is that an owner of land does not own the fugitive oil beneath it.

Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. —, 82 Southern 206, p. 211.

PERCOLATING OIL—USE OF PUMPS.

The owner of an oil well was drawing oil from it by means of a pump at the rate of 124 barrels a day. The adjoining landowner sunk a well on his land some 400 feet from the producing well which proved to be dry and was abandoned. By some underground communication air entered through the latter well in the radius affected by the pump in the first well, thereby reducing the suction and reducing the daily production of oil. The owner of the second well refused to close it and the first well owner brought suit to compel the second well owner to close the well and for damages suffered by reason of his failure to do so. In addition to the above facts the complainant averred that pumps were being used by other parties on all the adjoining tracts of land and were depleting the reservoir of oil which lies under the lands of that locality. A landowner is not bound to do anything to save the adjoining landowner from loss but he must abstain from doing anything that might cause a loss. Under the facts as averred and proved the owner of the second well was enjoined from leaving the well open to the adjoining landowner's damage, particularly so where the dry well was of no benefit to the owner. If the defendant's action was limited to preventing the oil from escaping from his land to that of the plaintiff, the plaintiff would have no good ground for complaint or for injunction; but so far as known no oil was being drawn out of the de-

defendant's land while under the averment and the proof the defendant was directly and seriously interfering with the complainant's right to operate for oil and interfered with the taking of oil from the complainant's own land, and with no benefit to himself.

Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. —, 82 Southern 293, p. 212.

OWNERSHIP OF WELL—TRANSFER OF AUTHORITY—LEGISLATIVE POWER.

The constitution does not directly or indirectly confer upon the chief mine inspector jurisdiction to enforce sections 4319, 4331 (R. S. 1910), intended to regulate the use and preservation of natural gas, drilling wells for oil and gas, piping, storage, or the purchase of the same, or to superintend the plugging of dry or abandoned oil and gas wells, or impose any duties in relation thereto to be performed exclusively by the chief mine inspector. No limitation is imposed upon the power of the legislature to transfer to some other officer or department any jurisdiction conferred, or duty imposed by statute on the chief mine inspector in relation thereto.

Love v. Boyle. — Okla. —, 180 Pacific 705, p. 708.

CONSERVATION COMMISSION—AUTHORITY TO TAKE POSSESSION OF GAS WELL—INJUNCTION.

The statute of Louisiana (act No. 71, of 1906) empowers the conservation commission or the department of conservation to take possession of gas wells that are wild, uncontrollable, or burning. A certain well, known as the "White" well, had for a long time been running wild and wasting gas. The Louisiana Gas & Fuel Company had a near-by well that produced enormous quantities of gas. It was believed that the latter well in some way contributed to the waste in the "White" well. A committee was appointed to investigate the conditions, and after investigation reported that the trouble with the "White" well was attributable to no defect in the well of the Louisiana Gas & Fuel Company. The company, to satisfy itself, "killed" its well and allowed it to remain dormant and unproductive for four months, discovered that during that time the "White" well remained unaffected. The conservation commission notified the Louisiana Gas & Fuel Company that it intended to take possession of the company's well and kill it entirely or permit it to blow for a satisfactory period to determine the effect on the "White" well. On a petition by the Louisiana Gas & Fuel Company and under an averment that if its well was permitted to blow 15 days it would cause a waste of 975,000,000 cubic feet of gas, destroy the well, and would materially damage the gas field in the vicinity of the gas

and fuel company and that the injury to it would be irreparable, the gas and fuel company was granted an injunction restraining the conservation commission from taking possession of its well and from interfering with its possession and operation of the same. Subsequently the department of conservation obtained a counterinjunction prohibiting the Louisiana Gas & Fuel Company from interfering with it in its proceedings to take possession of the well or interfering with its operations. Under these facts the Louisiana Gas & Fuel Company was entitled to a writ of prohibition against the judge prohibiting the enforcement of the injunction obtained by the department of conservation under the rule that an injunction once issued should not be dissolved *ex parte*, whether the dissolution be effected by a motion to dissolve or by a counterinjunction.

Department of Conservation v. Louisiana Gas & Fuel Co., 144 La. —, 81 Southern 454, p. 456.

INDIAN LANDS.

LEASE BY INDIAN—APPROVAL BY SECRETARY—RELATION—ESTOPPEL.

A lease executed by an Indian allottee was neither void nor voidable because the parties made and delivered it subject to the approval of the Secretary of the Interior before the term of the lease began to run. Subject to that approval the parties to the lease by its execution and delivery estopped themselves and those claiming under them with notice of the lease from denying, revoking, or avoiding it when approved by the Secretary as against the parties to it and those claiming under them with notice, and it related back to and took effect as of the date of its execution.

Anchor Oil Co. v. Gray, 257 Federal 277, p. 280.

LEASE BY HEIRS—VALIDITY—RIGHTS IN ROYALTIES.

A surviving husband and two minor children by their legal guardian, the heirs of an Indian allottee that died intestate in November, 1908, leased in 1912 the inherited homestead for oil and gas in accordance with the rules and regulations prescribed by the Secretary of the Interior. One of the minor children was born before and the other after March 4, 1906. The lease was for a term of ten years and as much longer as oil or gas were found in paying quantities and provided for the payment of stipulated royalties. The rights of the heirs among themselves was not to be altered or affected. These minerals were part of the homestead and the lease operated as a sale of them as and when they were extracted; and in that sense the heirs were exchanging a part of the homestead for money paid as royalties but no heir was surrendering any right to the other. The rights of all in the royalties were the same as in the homestead. Under the act of May 27, 1908, (35 Stats. 312), the homestead of an Indian allottee was set apart for the use and support of any children born after March 4, 1906, but not extending beyond April 26, 1931. Under this act the child born after March 4, 1906, was entitled to the use of all royalties, the interest or income that may be obtained by properly investing the same, during such time, leaving the principal as well as the homestead to go to the heirs in general on the termination of the rights of such child.

Parker v. Riley, 39 Supreme Ct. Rep. 405.

See *Parker v. Richard*, 39 Supreme Ct. Rep. 442.

RESTRICTED LANDS—MINING FOR OIL AND GAS—SUPERVISION BY SECRETARY.

Under the Act of 1908 (35 Stat. 312) leases were made of "restricted lands" for oil and gas mining with the approval of the Secretary of the Interior and under regulations prescribed by him. The land was then restricted and the restrictions have not since been removed, and the event which the regulations and lease provide shall terminate the supervision of the Secretary of the collection, care, and disbursement of the royalties has not occurred. Both the allottee and the heirs being full blooded Indians they are regarded by the act as in need of protection, and in the absence of some provision to the contrary the supervision naturally falls to the Secretary of the Interior. The heirs may remain owners until the restriction expires in regular course in 1931. There is nothing in the act indicating that it intended in the meantime to take from the Secretary or to commit to the courts the supervision of matters pertaining to the lease or to the royalties. The representatives of the Secretary of the Interior could not therefore be enjoined from collecting future royalties on the oil and gas lease.

Parker v. Richard, 39 Supreme Ct. Rep. 442, p. 444.

LEASE BY INDIAN ALLOTTEE—PRIORITY OVER LEASE BY HEIRS.

The only restriction on alienation by an Indian allottee and removal by the death of such allottee, were restrictions on the alienation of the right in the lands which descended to heirs upon her death, and those rights were inferior and subject to the rights of the lessees of an oil lease executed by the allottee in her life time and subsequently approved by the Secretary of the Interior. When the lease was approved as provided by law, then it became impregnable to the attacks of the heirs and persons claiming under them with notice of the prior lease.

Anchor Oil Co. v. Gray, 257 Federal 277, p. 280.

OIL LEASE—RESTRICTIONS ON ALIENATION.

The restrictions imposed by statute upon alienation of land by an Indian allottee could only be removed by the approval of an oil lease by the Secretary of the Interior. The death of the allottee, the lessor, before the approval of the lease did not remove but perpetuated the restriction on the alienation of the land, and after the death of the lessor the only act which the lessor had done by which the land could be alienated was the execution of the lease and the alienation by that lease was restricted and it could have effect only when approved by

the Secretary. Therefore, a condition in the lease on which it was to take effect was never fulfilled and the lease never became operative.

Anchor Oil Co. v. Gray, 257 Federal 277, p. 289.

OIL AND GAS LEASE—DEATH OF ALLOTTEE—RESTRICTIONS UPON
ALIENATION.

The Act of May 27, 1908 (35 Stats. 315), provides that the death of an allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of the lands of any allottee, but under the act a conveyance shall be approved by the proper court. This act is prospective and not retrospective in effect and applies to leases made after its passage and can not apply to a lease made by a full-blooded Creek allottee before its passage.

Anchor Oil Co. v. Gray, 257 Federal 277, p. 279.

OIL LEASE—APPROVAL AFTER DEATH OF ALLOTTEE.

The Act of April 26, 1906 (34 Stats. 137, p. 145), authorizes the Secretary of the Interior to approve and thereby to perfect oil and gas mining leases of allotments by full-blooded allottees of the Creek Indians. This authority does not cease at the death of the allottee by reason of the provisions of the Act of May 27, 1908 (35 Stats. 315); but the Secretary may approve and validate such a lease after the death of the allottee, the lessor.

Anchor Oil Co. v. Gray, 257 Federal 277, p. 279.

PUBLIC LANDS.

WITHDRAWAL—PICKETT ACT—CONSTRUCTION.

The Pickett Act (Act June 25, 1910, 36 Stat. 847, Compiled Stats., secs. 4523-4525), is a remedial statute and should be liberally construed to protect bona fide occupants of public oil or gas lands who in good faith were at the date of a withdrawal engaged in work leading to discovery by giving them the right to continue their work to a discovery and thereafter to extract and market the oil and to acquire title notwithstanding the withdrawal. It is of no consequence from whom the occupants obtained possession if they were at the date of withdrawal claiming in their own right no more land than they would be entitled to take under the mining laws and were acting in good faith and with an honest purpose to comply with the law.

United States v. Rock Oil Co., 257 Federal 331, p. 333.

See Consolidated Mutual Oil Co. v. United States, 245 Federal 521.

EMINENT DOMAIN.

RIGHT OF WAY OVER MINING CLAIM.

A railroad right of way across a mining claim in a national forest is superior to the right of a claimant who held under his mining claim until the land was thrown open and who then settled and obtained patent under the homestead law.

Van Dyke v. Arizona Eastern R. Co., 248 U. S. 49, p. 52.

PIPE LINES—CANCELLATION OF DEED—RIGHTS OF PIPE LINE OWNERS.

A court may cancel a void deed purporting to grant the right to construct and maintain a pipe line on a tract of land and ascertain and decree the damages. But the damages must be limited in elements and amount to the date of acquisition of the right to occupy and use the land and do not include compensation allowed by law for rightful taking of a tract of private land for public use and injury to the residue thereof.

Given v. United Fuel Gas Co. — W. Va. —, 99 Southeastern 476, p. 477.

MINING CORPORATIONS.

DE FACTO CORPORATION—WHAT CONSTITUTES.

A mining corporation de facto existed where there was an attempt in good faith to comply with the statutory requirements authorizing such a corporation and where it elected corporate officers, took over a contract for the lease of a mine, and expended large sums of money in operating and developing the mine, all ostensibly as a corporation.

Grant Chrome Co. v. Marks, — Oreg. —, 181 Pacific 345, p. 346.
See 1 Thompson on Corporations (2d Ed.), Sec. 226.

CORPORATION DE FACTO—RIGHT TO QUESTION.

The rule is, that as between private parties, the right of a corporation de facto to act as a corporation can not be questioned.

Grant Chrome Co. v. Marks, — Ariz. —, 181 Pacific 345, p. 346.

CORPORATION WITHOUT CAPITAL STOCK.

A corporation without capital stock and without shares of stock is not new in corporate organization. Such corporations are as old as corporations themselves and have existed for many years in England and in this country. A foreign corporation organized without capital stock and without shares of stock can not on that ground alone, where it complies with the statute, be denied admission to do business in the State of Kansas.

North American Petroleum Co. v. Hopkins, — Kan. — 181 Pacific 625, p. 627.

KNOWLEDGE OF PROMOTER IMPUTED TO CORPORATION.

A mining company organized by a promoter who was its financial agent, its sole stockholder and controlling director, is chargeable with the knowledge of its promoter, stockholder, and director affecting the title of property conveyed to the corporation, and his knowledge must be imputed to the corporation organized and managed by him.

Peabody Consol. Copper Co. v. Maier, — Ariz. —, 181 Pacific 177, p. 179.

FOREIGN CORPORATION—RIGHT TO DO BUSINESS IN STATE.

A foreign mining corporation whose stock is without any nominal or par value may be admitted to do business in the State of Kansas.

The Charter Board of the State on application of a foreign corporation should concern itself earnestly to ascertain the capital of the applicant, the assets permanently devoted to the corporate business as a basis of its credit and upon which its hope of profits is rationally founded.

North American Petroleum Co. v. Hopkins, — Kan. —, 181 Pacific 625, p. 627.

AUTHORITY OF OFFICERS—PROOF.

The minutes of a board of directors of a mining corporation do not constitute the only evidence admissible for the purpose of showing authority on the part of corporate officers for the payment of corporate funds for material and supplies purchased and used on behalf of the corporation.

Fowler Gas Co. v. Weber, — Cal. —, 181 Pacific 663, p. 666.

AUTHORITY OF OFFICERS—ESTOPPEL.

Where a person without fraud or collusion deals with a mining company through an officer who is in the active management of the business of the company, the company will be estopped from relying upon any lack of authority in the officer as a defense against the rights of the person so dealing with him, if the act done by the officer was one which the corporation itself might do.

Hammitt v. Virginia Min. Co., — Idaho —, 181 Pacific 336, p. 338.

AUTHORITY OF SUPERINTENDENT.

The office of superintendent of a coal mining company implies some power to employ and discharge miners and to do such other things as under the circumstances may reasonably be required, the extent thereof depending in some degree on the way the business has been previously conducted and managed by him. Whether a particular contract falls within the implied powers of an officer of a mining company depends upon whether or not it is within the scope of the ordinary business intrusted to his management.

Rua v. Bowyer Smokeless Coal Co., — W. Va. —, 99 Southeastern 213, p. 217.

See Carroll-Cross Coal Co. v. Abrams Creek Coal & Coke Co., — W. Va. —, 98 Southeastern 148.

DEED EXECUTED BY OFFICERS—PRESUMPTION OF AUTHORITY.

Where a deed to certain mining property was executed and delivered by the president and secretary of the company authority on

the part of the officers will be presumed and the burden will be cast upon the corporation to show want of such authority.

Lawrence v. Montgomery Gas Co., — W. Va. —, 99 Southeastern 496, p. 499.

FRAUD OF DIRECTOR AND GENERAL MANAGER.

The general manager and controlling director of a mining company obtained a judgment against the company on an indebtedness due him and on execution sale purchased the mines of the company for a small amount. After obtaining a deed for the property he leased the mines to the mining company and afterwards himself as promoter and general manager and controlling stockholder organized a new mining corporation and conveyed to it the mining property. As such general manager and controlling director of the original mining company he was charged with full knowledge of the creditors of such company and of the amount of their debts owing by it. Under these facts the succeeding corporation was chargeable with notice that the original mining company had in effect preferred its principal stockholder and general manager as a creditor to its other unsecured creditors and by means of a judgment permitted him to convert to his own use all of its assets, to the loss of its general creditors. Under these facts the property of the original debtor corporation in the hands of the successor corporation was liable for the debts of the unsecured creditors of the original mining company.

Peabody Consol. Copper Co. v. Maiser, — Ariz. —, 181 Pacific 177, p. 179.

CONTRACT TO DRILL—AUTHORITY OF GENERAL MANAGER.

An oil well drilling corporation was bound by a contract made by its general manager and was bound by the acts of its general manager where he entered into an agreement to drill a well and caused the well drilling equipment to be moved on the premises and employed drillers and began drilling the well.

Hinton v. D'Yarmett, — Tex. Civ. App. —, 212 Southwestern 518, p. 522.

AGENT AS TRUSTEE.

An officer and agent of a mining corporation acting for it entered into an agreement with a landowner that in consideration of the payment of a certain bonus the landowner would execute to the agent an oil and gas lease for certain lands. The mining company through the agent paid one-half of the bonus from its own funds and thereupon the landowner executed the lease as agreed upon to the agent. The mining company pursuant to the arrangement entered upon the

premises and expended a large amount of money in developing the lease. The mining company could not compel the landowner to execute to it a second lease on the payment or tender of the balance of the bonus but it was entitled to all the privileges and benefits of the lease and the agent held the lease as trustee in trust for the benefit of the corporation.

Hibernian Petroleum Co. v. Davies, — Cal. App. —, 181 Pacific 836, p. 838.

STOCK SUBSCRIPTION—FRAUD—SPIRITUALISTIC REVELATIONS.

A stockholder in an oil company brought suit to recover money paid for stock on the ground of fraudulent representations as to the existence of oil under the land. One element of the fraud consisted in the fact that the defendant had represented to the complainant that spiritualistic communications had been made to the effect that there was oil under the land. Representations to the effect that spirits had revealed through a medium the existence of oil in valuable quantities beneath the lands in question must under the circumstances of the case be regarded as insufficient to form a basis for relief to the complainant.

Burchill v. Hermsmeyer, — Tex. Civ. App. —, 212 Southwestern 767, p. 771.

STOCKHOLDERS' MEETING—NOTICE—RATIFICATION OF CONTRACT.

The fact that a notice of a stockholders' meeting to consider the ratification of a contract for the sale of all of its property to be paid for in stock in the purchasing company, was accompanied by a letter from the president stating that the stock to be issued by the purchasing company would be distributed to the stockholders of the selling company, would not render the meeting illegal and is not a matter of which objecting stockholders can complain, where the stockholders' meeting did not decide upon the question of the distribution of the stock, but expressly declared it was not their purpose to do so. The ratification of the proposed sale and the acceptance of the stock in consideration of the sale of the property was clearly within the call.

Logie v. Mother Lode Copper Mines Co., — Wash. —, 179 Pacific 835, p. 839.

RECORD OF STOCKHOLDERS—TRANSFER OF STOCK.

The statute of Colorado (Section 870, R. S. 1908), requires a mining corporation as well as other corporations, to keep a stock book containing the names of all stockholders, the number of shares owned by each, and the date at which they became shareholders. On presentation of a certificate properly indorsed it is the duty of the sec-

retary to make the proper transfer on the books and the transferee then becomes the stockholder and the company is under obligation to issue to him the certificates of stock. The corporation is not required to determine the title to the shares prior to the transfer on the books. The authority given by the power of attorney embodied in the indorsement sufficiently protects the corporation. If the person or agent presenting the shares of stock for transfer violates the instructions as to the transfer, such person or agent, and not the corporation is liable for the breach of duty.

Valley View Consol. Gold Min. Co. v. Whitehead, — Colo. —, 180 Pacific 737, p. 738.

Capitol Petroleum Co. v. Hauldeman, — Colo. —, 180 Pacific 758, p. 759.

RIGHT OF STOCKHOLDER TO STOCK CERTIFICATES.

A stockholder in a mining corporation is entitled to receive from the corporation certificates of stock representing his interest in the corporation and it is the duty of a corporation and its proper officers to issue and deliver certificates to the stockholder and to record his ownership of the shares in the stock book containing a list of the stockholders and the number of shares held by each.

Capitol Petroleum Co. v. Hauldeman, — Colo. —, 180 Pacific 758, p. 759.

SALE OF MINING STOCK—"SPECULATIVE SECURITY"—VIOLATION OF "BLUE SKY" LAW.

The statute of North Dakota, (Laws 1915, Chap. 91), makes it unlawful for any person to sell or offer for sale any speculative securities without obtaining the proper authority to make the sales. The term "speculative securities" means securities into the specific par value of which the element of chance, speculative profits or possible loss equal or predominate over the element of reasonable certainty, safety and investment. Under this statute a criminal complaint is sufficient where it charged that a certain named person wilfully, unlawfully and feloniously and without having complied with the provisions of the statute, sold an agreement for buyer's certificates of the Lignite Consumers' Mining Company of North Dakota, and where it sufficiently appeared that the certificate was to be issued in the future and by a corporation to be organized in the future and the mines from which coal was to be sold were to be developed in the future.

State v. Welch, — N. Dak. —, 172 Northwestern 234.

SALE OF STOCK—AGREEMENT TO RECONVEY—PAROL PROOF.

Where a sale of mining stock was accompanied by an unconditional agreement to reconvey the stock upon the payment of the

indebtedness for which the stock was transferred such a condition as a matter of defeasance can be established by parol.

Kleinecke v. North Confidence Min. & Dev. Co., — Cal. App. —, 182 Pacific 313, p. 315.

SALE OF STOCK BY AGENT—LIABILITY.

A mining company acting as a stock broker in the business of buying and selling mining stocks and mining securities may be liable for the acts of its manager at a branch office though such manager did not act strictly within the terms of his employment.

Sullivan v. Evans-Morris-Whitney Co., — Utah —, 180 Pacific 435, p. 437.

OPTION TO PURCHASE STOCK—EXPIRATION OF TIME.

The owner of stock in a mining company gave an option to a third person to purchase the same but provided that the purchase should be made within a stated time. After the expiration of the time stated without any attempt made to take advantage of the option the optionee no longer had any claim upon the stock.

Kleinecke v. North Confidence Min. & Dev. Co., — Cal. App. —, 182 Pacific 313, p. 315.

STOCK EXCHANGED FOR PROPERTY—GOOD FAITH—DETERMINATION.

In the exchange of \$1,000,000. the entire capital of a mining company, for certain mining claims, the fact that there was an agreement by which shares of stock of the par value of one dollar each and of the total par value of \$500,000 were returned to the corporation and shortly thereafter several thousand of these shares of this stock were sold at five cents a share, was sufficient to cast grave suspicion upon the existence of any honest and intelligent belief that the mining claims were in fact worth \$1,000,000. Under these circumstances, evidence was admissible as bearing on the honest belief of the corporator as to the value of the mining property and for the purpose of showing whether such belief was in fact honest and intelligent.

Hasson v. Koeberle, — Cal. —, 181 Pacific 387, p. 389.

STOCKHOLDER'S LIABILITY—STOCK EXCHANGED FOR MINING PROPERTY.

Where mining stock is sold for money and the purchase price is less than the par value of the stock the difference between the par value and the amount actually paid is the measure of the stockholder's liability to the creditor. But where corporate stock is issued for mining property having no generally defined value, the rule

is that where the corporation and stockholders have agreed upon the given value for the property transferred such valuation is binding and conclusive unless it is fraudulent in purpose or effect. Where the parties place upon the property a valuation in excess of what they knew or believed to be its true value, this is a constructive fraud upon the creditors and the stock will be deemed paid only to the extent of the actual value of the mining property received in exchange for it.

Hasson v. Koeberle. — Cal. —, 181 Pacific 387, p. 388.

See Herron v. Shaw, 165 Cal. 668, 133 Pacific 488.

Harris v. Armour, 169 Cal. 787, 147 Pacific 1166.

PURCHASE OF STOCK—PROMISE TO RETURN MONEY IF OIL NOT DISCOVERED.

A stockholder in an oil company brought suit to recover money paid for stock. The stock was subscribed by the complainant on an ordinary stock subscription form. At the time of the payment a contract was entered into between the subscriber and the oil company reciting the consideration, the purpose and the application of the payment and the subscriber was given the privilege of increasing his subscription if desired. The complainant alleged that at the time of making the subscription and at the time of the payment of the money a parol promise was made to the effect that if oil was not discovered the money should be returned. The complainant also averred that the oral promise to repay the money was fraudulently made for the purpose of inducing the payment. The oral contract was not collateral to the written contract but was on the part of the promisor an agreement to do something in the future and to be the basis of a fraud the burden was on the complainant to show that the promisor did not at the time intend to fulfill the promise, but intended thereby to deceive the plaintiff and induce him to advance the money he did advance. The mere proof of the promise and the failure to repay as promised was not sufficient to establish the fraud as alleged.

Burchill v. Hermsmeyer. — Tex. Civ. App. —, 212 Southwestern 767, p. 769.

SHARES OF STOCK—INDORSEMENT AND TRANSFER OF CERTIFICATES.

A blank indorsement of a certificate of stock in a mining company makes the certificate transferable by delivery and the holder of the certificate by purchase, is, as against the corporation, the equitable owner of the share named therein and may lawfully write in the blank the name of any person as assignee or as attorney in fact where the certificate appointed an unnamed person to transfer the stock on the books of the corporation.

Valley View Consol. Gold Min. Co. v. Whitehead, — Colo. —, 180 Pacific 737, p. 738.

TRANSFER OF STOCK—EFFECT AND OWNERSHIP.

The transfer of shares of stock on the books of a corporation perfects the title of the holder of a certificate issued on such transfer and he becomes the legal and equitable owner of the shares of the stock. The transfer is made, not by the corporation, but by the owner of the shares or his attorney.

Valley View Consol. Gold Min. Co. v. Whitehead, — Colo. —, 180 Pacific 737, p. 738.

TRANSFER OF STOCK—MANDAMUS TO COMPEL.

A stockholder in a mining corporation is entitled to receive from the corporation certificates of stock representing the interest held or owned by the stockholder, and on refusal of the officers of the corporation to make a proper transfer of the stock and to issue to the stockholder the certificates to which he is entitled, the holder is entitled to a writ of mandamus to compel the corporation and its officers to make the proper transfer upon the books of the company and to issue the proper certificates therefor. The holder of such stock has no adequate remedy at law because of the uncertain value of such stock and the possibilities of sudden increase in value.

Capital Petroleum Co. v. Hauldeman, — Okla. —, 180 Pacific 758, p. 759.

PLEDGE OF STOCK AS SECURITY—PURCHASER WITH NOTICE.

The owner of stock in a corporation pledged it to a corporation to secure advancements made by it to another corporation in which the pledgor was interested. The pledgee subsequently deposited the stock with a bank as collateral security for its indebtedness to the bank. This debtor corporation afterward became bankrupt and the stock was sold to satisfy the debt and one of the active managing officers of the bankrupt corporation with full knowledge of all the facts purchased the stock. The purchaser under such circumstances could not hold the stock as against the original owner and pledgor after all advancements for which the stock was originally deposited as security had been paid.

Kay v. Piney Coal & Coke Co., — W. Va. —, 99 Southeastern 501.

SALE OF PROPERTY—PAYMENT IN STOCK.

A mining company whose charter authorized it to acquire and sell real estate and also to purchase and own stock in other corporations

has a right to sell all of its property and to accept stock of another corporation in payment for the property sold.

Logie v. Mother Lode Copper Mines Co., — Wash. —, 179 Pacific 835, p. 838.

See Butler v. New Keystone Min. Co., 10 Delaware Chanc. 331, 93 Atlantic 380.

Sraher v. Lucas Prospecting Co., 124 Iowa 107, 99 Northwestern 290.

SALE OF PROPERTY—CONSIDERATION—DEVELOPMENT OF MINING PROPERTY.

The sale by a mining corporation of all its property and the acceptance of stock in another mining company is not wanting in consideration because of the existence of an executory contract for the development of the mining property and transportation facilities on the part of the company owning such stock, as conditions of an executory contract to be performed in the future are no less a consideration for the present transfer of property because they rest in part upon the faith that they will be kept and performed by the promissor. In case of a failure of the consideration, the injured party is not without a remedy.

Logie v. Mother Lode Copper Mines Co., — Wash. —, 179 Pacific 835, p. 838.

POWER TO SELL PROPERTY—RIGHTS OF MINORITY STOCKHOLDERS.

A mining corporation whose articles of incorporation gave it power to purchase and acquire real estate and alienate the same in whole or in part, may sell any or all of its property notwithstanding the dissent of minority stockholders.

Logie v. Mother Lode Copper Mines Co., —, Wash. —, 179 Pacific 835, p. 837.

See Parsons v. Tacoma Smelting & Refining Co., 22 Wash. 492, 65 Pacific 765.

Pitcher v. Lone Pine-Surprise Consol. Min. Co., 39 Wash. 608, 81 Pacific 1047.

Smith v. Flathead River Coal Co., 66 Wash. 408, 199 Pacific 858.

TRANSFER OF PROPERTY—PROPERTY HELD IN TRUST.

A creditor recovers a judgment against a mining company for goods and merchandise sold the company and an order of sale for certain mines formerly the property of the company but then in the possession of another mining company as the successor and the present owner of the assets of the original mining company and as successor to the corporate franchises, rights and liabilities of the original company. The mines in the possession of the successor of the original debtor corporation were subject to the judgment of the creditor of the original corporation on the theory that the succeed-

ing corporation through its promoter who was its sole stockholder and controlling director had knowledge of the indebtedness and that the transfer of the property was for the purpose of avoiding the payment of the debts of the mining corporation.

Peabody Consol. Copper Co. v. Maier, — Ariz. —, 181 Pacific 177, p. 179.

LOAN TO PRESIDENT—LIABILITY OF CORPORATION.

The president of a mining company procured a loan and gave the note of the corporation secured by a mortgage on the land of the corporation. The lender had notice that the loan was in fact for the personal use of the president and was received by him and so used. Under these facts the lender could not enforce the mortgage against the property of the mining company.

Gross Iron Co. v. Paulte. — Minn. —, 172 Northwestern 907.

PURCHASE OF LEASES—NOTICE OF PARTNERSHIP.

An oil and gas company purchasing leases from a firm was charged with knowledge that the concern was a partnership and was operating under a fictitious name. The purchasing corporation was also presumed to have been acquainted with the statutes of the State and that a failure of a partnership to comply with statutory requirements would render its contracts unenforceable.

Warren Oil & Gas. Co. v. Gardner, — Ky. —, 212 Southwestern 453, p. 457.

OWNERSHIP OF LAND—TIMBER HELD IN TRUST.

The Houston Oil Company was organized to pay for and take title to certain lands. It appearing doubtful whether an oil company had a right to hold timber lands a lumber company was organized to hold the timber in trust for the oil company, but the price of the timber was paid by the oil company. This was sufficient to vest the title in the oil company.

Keith Lumber Co. v. Houston Oil Co., 257 Federal 1, p. 6.

LIABILITY FOR NEGLIGENCE OF SERVANT.

An oil company engaged in selling oil and gasoline furnished its manager in charge with an automobile for use in the discharge of his duties. The manager was prohibited from using the company's car except during business hours in the transaction of company business. The manager on a particular day worked with an assistant until 10 o'clock at night in preparing an invoice of the stock belonging to the company that was required to be mailed to reach the company's office by the end of the month. The invoice was finished at 10 o'clock at night and the manager and his assistant

started in the machine to the post office to mail the invoice, but in making the trip to the post office they left the street leading directly to the post office and went to the express office to obtain a package belonging to the assistant and while out of the direct course to the post office the manager negligently ran the machine against a pedestrian to his injury. The deviation in driving the machine to the express office with the intention of continuing in the business of the employer in mailing the invoice was not sufficient to relieve the oil company from liability for the injury to the pedestrian.

Pierce-Fordyce Oil Association v. Brading. — Tex. Civ. App. —, 212 Southwestern 707, p. 709.

BONDHOLDERS' CONSENT TO LEASE—RIGHT TO SELL—ESTOPPEL.

A trust deed securing the bondholders of a mining corporation authorized the sale of the property in case of default and also provided that the owner could with the consent of the trustee lease the property for mining operations. The bondholders concluded that a sale of the property would be disastrous to them and consented that the mining corporation as owner should lease the property so that it could be successfully operated for the payment of interest. After so consenting to the lease and after the property was leased for mining operations the bondholders were estopped from foreclosing the trust deed and selling the property.

Oberman v. Red Rock Fuel Co., — W. Va. —, 90 Southeastern 66, p. 72.

MORTGAGE TAX—RIGHT TO RECOVER—MISTAKE AS TO TITLE.

The Federal Coal Company, a corporation of Kentucky, executed a mortgage on lands believed to be owned by it to secure a loan of \$1,350,000. The statute of Kentucky imposes a tax of 20 cents upon each \$100 of mortgage indebtedness. After the mortgage tax of \$2,700 was paid by the coal company the deed conveying the mortgaged lands to the coal company was set aside and the mortgage of the coal company to secure the loan was canceled. The tax was not imposed upon the mortgage by the statute but upon the indebtedness secured by the mortgage. The mortgage evidenced the indebtedness and enabled the officer to know the amount of the tax to be collected upon the indebtedness. The tax was not recoverable by the coal company upon the theory that it was paid under a mistake of law or fact as the mistake consisted in its belief that it owned the title to the land when it did not. The coal company was not relieved of the indebtedness by its loss of the land, and there was no mistake about the execution of the mortgage. The taxing officer was under no duty to ascertain the coal company's title to the land nor was

he under any duty to pass upon the sufficiency of the security afforded by the mortgage. His duty extended no further than to know that there was an indebtedness and that such indebtedness would not mature for five years and to collect the tax due on the amount of the indebtedness and record the mortgage. The coal company was not in the attitude of a person from whom a tax had been illegally collected, but as it was legally liable for the tax when paid the fact that by subsequent discovery its payment might have been avoided was not sufficient to authorize its recovery.

Greene v. Federal Coal Co., — Ky. —, 212 Southwestern 580.

OIL WELL DRILLER—LOSS OF TOOLS—LIABILITY—CUSTOM.

An oil company owning lands and leases employed a well driller to drill an oil and gas well upon its premises, for which the driller was to receive \$1.75 a foot and \$60 a day for day work and this included underreaming, pulling the pipes, cleaning out and other work of that kind. The driller employed his own men to do the work on the well. In the process of drilling the well a strong flow of gas was struck. The gas was permitted to flow from the well and was by the wind carried over and to the boiler used with an open fire for drilling and became ignited, thereby burning and destroying the tools of the driller. The oil company was not liable for the loss of the tools under the contract of employment and could not be held liable on proof of a general usage and local custom to the effect that where a driller is working for and under the direction of the owner of the well being drilled, the owner is responsible for losses to the drillers' tools resulting from fire. Proof of such a custom was inadmissible.

Henderson v. Magnolia Petroleum Co., — Kan. —, 180 Pacific 228.

INTERSTATE COMMERCE—LOCAL REGULATIONS.

A natural gas company engaged in transporting natural gas from one State to another and from its main pipe line supplied gas for domestic purposes also, is not engaged in interstate commerce so as to prevent it from being subject to the local workmen's compensation act and liable for injuries to an employee engaged in the State in assisting in the excavation of a ditch for the purpose of laying an additional pipe line to increase the capacity.

Roberts v. United Fuel Gas Co., — W. Va. —, 99 Southeastern 549, p. 551.

MINING PARTNERSHIPS.

JOINT ADVENTURE AND PARTNERSHIP—DISTINCTION.

The principal distinction between a partnership and a joint adventure is that generally in the latter case one party may sue the other at law for a breach of the contract; but this right to sue at law does not preclude a suit in equity for an accounting as between the joint adventurers the same as in a partnership. The remedy at law does not preclude a suit in equity for an accounting.

Miller v. Walsert, — Nevada —. 181 Pacific 437, p. 442.

JOINT ADVENTURERS—RIGHTS, DUTIES, AND LIABILITIES.

Four persons entered into a joint contract of adventure to purchase mining claims upon which one of them held an option. It was agreed that the one holding the option was to contribute to the joint adventure his option to purchase; another was to contribute his services and knowledge as an experienced mining engineer in examining the property, the third was to contribute his legal services, and the fourth was to contribute money to bear the expenses. The money was not to be paid until the engineer had made his investigation and reported the probable value of the property. It was discovered upon examination by the engineer that the mining property was of great value, and thereupon three of the parties, in the absence of the fourth, who was to advance certain money, themselves advanced the necessary money, purchased the claims, and secured title to the property. No opportunity was given the fourth member to pay or advance the money according to the contract. Under these facts an implied trust was created as effectually as if the promising member had actually furnished the consideration to purchase the property. The money advanced by the three parties to the contract would be in the nature of a loan to the joint adventurers and for the benefit of all the joint adventurers, but the advancement of the money under such circumstances did not entitle the parties so advancing to any separate rights as against their co-adventurer.

Miller v. Walsert, — Nevada —. 181 Pacific 437, p. 441.

JOINT ADVENTURERS—FIDUCIARY RELATION—GOOD FAITH.

The relation between joint adventurers to purchase mining property is fiduciary in its character, and the utmost good faith is required of the trustee to whom the deal or property may be entrusted and such trustee will be held strictly to account to his coadventurers and will not be permitted by reason of the possession of the property or profits, whichever the case may be, to enjoy an unfair advantage or have any greater rights in the property by reason of the fact that he is in possession of the property or profits as trustee than his coadventurers are entitled to. The fact that he was entrusted with the rights of his coadventurers imposes upon him the sacred duty of guarding their rights equally with his own, and he is required to account strictly to his coadventurers, and they may recover after a denial by him of any of their rights.

Miller v. Walsert, — Nevada —, 181 Pacific 437, p. 441.

JOINT ADVENTURE TO ACQUIRE MINING PROPERTY—CONSIDERATION.

An agreement entered into by four persons to use their joint efforts to acquire certain mining property and convey title thereto to a corporation to be formed by them for the purpose of taking over the mining property is sufficient to establish a joint adventure; and a contract of joint adventure is sufficiently supported by a consideration growing out of the mutual promises of the parties.

Miller v. Walsert, — Nevada —, 181 Pacific 437, p. 441.

FAILURE TO COMPLY WITH STATUTE—VALIDITY OF LEASES—RIGHT OF OTHER PARTY TO ENFORCE.

A partnership was formed in Kentucky under a certain firm name for the purpose of engaging in the business of buying and selling oil and gas leases. The partnership failed to comply with the statute requiring the filing of a certificate by persons desiring to do business under an assumed name, and persons are prohibited from carrying on or conducting business under an assumed name without filing the required certificate in the office of the clerk of the county. A lease or contract made by a partnership without complying with the statute is unenforceable, but such a lease or contract is not void but is enforceable by the party not in fault, and he may compel specific performance or cancellation at his option on proper proof.

Warren Oil & Gas Co. v. Gardner, — Ky. —, 212 Southwestern, 456, p. 458.

EXTENT AND LIABILITY.

A mining partnership was formed for the purpose of drilling for oil and gas on certain described property. This partnership necessarily continued in the absence of an agreement to the contrary as respects the acquisition of additional property acquired and used in the line of business of the partnership and developed with partnership funds, labor, and material.

Rolshouse v. Wally, — Pa. —, 106 Atlantic 227.

ORAL AGREEMENT—PURCHASE AND SALE OF LEASE—STATUTE OF FRAUDS.

A partnership was formed for the purpose of obtaining oil and gas leases from landowners and then selling the leases. The contract of partnership was not in writing. On the purchase and sale of certain leases an excluded partner brought suit for an accounting and for a recovery from his associates for his share of the proceeds of the business. The fact that the leases themselves as between lessors and lessees were within the statute of frauds, because real estate was involved, did not affect the personal relation and obligation created by the agreement to deal in such instruments and divide the profits, and the statute of frauds would not prevent the plaintiff from recovering.

Bird v. Wilcox, — Kan. —, 180 Pacific 774, p. 775.

PURCHASE OF COAL LANDS—SPECIFIC PERFORMANCE—PREMATURE ACTION.

Two persons agreed to furnish equal sums of money to purchase Indian segregated coal lands to be sold by the Department of the Interior. The title was to be taken in the name of one for the joint use of both, and on demand a conveyance was to be made of a one-half interest therein to the other. The purchase price was furnished according to the agreement, and after the purchase the second partner demanded a conveyance of a one-half interest, and upon refusal instituted a suit for specific performance. But at the time of the commencement of the action the title to the land had not passed to the trustee by virtue of the certificate of purchase issued to him, and he was not entitled to the patent to the land until the conditions and terms of the sale were fully complied with. The action for specific performance was therefore prematurely brought and the plaintiff partner was not entitled to recover.

Mayhar v. Ward, — Okla. —, 180 Pacific 859 p. 860.

PRINCIPAL AND AGENT.

AUTHORITY OF AGENT—ESTOPPEL.

A mining company clothed certain of its officers, as agents, with apparent authority to procure an option upon mining claims, and such authority governs the mutual rights and liabilities growing out of the transactions between the company as principal and a third person with whom the agent dealt, and the company is estopped to deny the authority of its agent.

Hammitt v. Virginia Mining Co., — Idaho —, 181 Pacific 336, p. 337.

AUTHORITY OF MANAGER—LIABILITY OF PRINCIPAL.

A company of mining stock brokers engaged in the business of buying and selling mining stocks and mining securities had their general office at Salt Lake City. The company established a branch office at Eureka with a duly appointed manager in charge of the business of the company at such branch office. The manager of the branch office in the course of business received an order for the purchase of a thousand shares of the capital stock of a certain mining company, and thereupon placed the order with the principal company, and the stock was purchased, the purchaser paying the price and the commission to the manager of the branch office. The purchaser requested that the stock be retained in the possession of the principal so that notice of assessments or of dividends could be given through the company. The manager retained the stock, subsequently sold it and appropriated the proceeds. The purchaser of the stock under the circumstances had the right to assume that the manager was authorized to hold and retain the certificates of stock under his general authority as manager and the principal, the brokerage company, was liable for the conversion by the manager.

Sullivan v. Evans-Morris-Whitney Co., — Utah —, 180 Pacific 435, p. 438.

AUTHORITY OF SUPERINTENDENT OF COAL MINE—LIMITATION.

The superintendent of a coal mine in charge of the work impliedly has authority to employ and discharge miners and to make contracts necessary, properly to carry on the business of mining coal intrusted to him; but without specific authority he has no implied authority

to make a contract to extend beyond a reasonable time and necessary to the successful operation of the mine.

Rua v. Bowyer Smokeless Coal Co., — W. Va. —, 99 Southeastern 213, p. 217.

OIL AND GAS LEASE—BANK AS AGENT OF LESSOR.

An oil and gas lease provided that it should become void if the lessee did not begin operations on or before a certain stated date, unless the lessee paid to the lessor, or deposited to his credit in a certain named bank, a stated amount before the date fixed. Under such a provision the bank became the sole agent of the lessor for the reception of the money and a payment or a tender to the bank of the amount within the time was sufficient to keep the lease alive.

Texas Co. v. Wimberly, — Tex. Civ. App. —, 213 Southwestern 286, p. 289.

TRUST DEED—TRUSTEE AS AGENT OF BANK—ESTOPPEL.

A trustee in a trust deed for mining property given to secure bonds of the company was a director of the coal company and also cashier of the bank holding a majority of the bonds. The president of the bank was also the president of the coal company. The president and the cashier of the bank in acquiescing in a lease of the coal property rather than requiring a sale under the trust deed, must be treated as the bank's agents duly authorized to act on its behalf and they and the bank were estopped from denying the agency.

Oberman v. Red Rock Fuel Co., — W. Va. —, 99 Southeastern 66, p. 72.

BENEFITS FROM UNAUTHORIZED ACTS—MINING CORPORATION—LIABILITY.

A mining company through its president and secretary paid money under the terms of a second option obtained by the officers of the company on a mining claim, and sought to have the payment credited to the company under a former option. The corporation seeking to retain a benefit derived from the unauthorized act of its agent or officer is chargeable with the instrumentality thus employed and will not be permitted to disclaim responsibility flowing therefrom and to claim or retain the fruits of the transaction.

Hammitt v. Virginia Min. Co., — Idaho —, 181 Pacific 336, p. 338.

MINING TERMS.

ACCIDENT.

An "accident" is an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character and often accompanied by a manifestation of force.

Gilliland v. Ash Grove Lime & Portland Cement Co., — Kan. —, 180 Pacific 793, p. 794.

ANNUAL ASSESSMENT WORK.

Annual assessment work as applied to a mining claim has nothing to do with locating or holding a claim before discovery. It is a condition subsequent to discovery and location to be performed in order to preserve to the locator the exclusive and continued right of possession.

Union Oil Co. v. Smith, 39 Supreme Ct. Rep. 308, p. 311.

DAY MAN.

A day man in a mine is one whose duty it is to go through the entries and see that they are safe.

Teter v. Central Coal & Coke Co., — Mo. App. —, 213 Southwestern 135, p. 136.

COURSE OF EMPLOYMENT.

The term "course of employment" means where a miner is working within the period of the employment at a place where he may reasonably be and while he is reasonably fulfilling the duties of his employment or is doing something incidental thereto.

Granite Sand & Gravel Co. v. Willoughby, — Ind. App. —, 123 North-eastern 194, p. 195.

FIRST AID.

First aid as applied to an injured miner is defined to be immediate attention given to an injured miner with the object of arresting hemorrhage, relieving pain, and preserving life until the services of a physician can be obtained.

Hunicke v. Meramec Quarry Co., — Mo. —, 212 Southwestern 345, p. 346.

GENERAL MANAGER.

The term "general manager" imports general authority to perform all reasonable things in conducting the usual and customary business of his principal.

Hinton v. D'Yarmett, — Tex. Civ. App. —, 212 Southwestern 518.

GOOD CLEAN HOLE.

As applied to oil well drilling a "good clean hole" is one free from those things the presence of which would render the well incapable of use as a well.

Bain v. White, 256 Federal 428, p. 432.

HEADER.

A header consists of a piece timber from four to six inches square and from ten to twelve feet in length and is placed across the weak portion of a roof and is supported by posts under each end, thus leaving a space for operating a coal cutting machine.

Consolidated Coal Co. v. Marcum, 257 Federal 287, p. 289.

IMPROVEMENTS.

The term "improvements" used in a contract of sale of a mine means such things as are placed thereon by way of betterment and which are of a permanent nature and which add to the value of the property as real property and aid in the extraction of ores profitably and successfully.

Seigloch v. Bisbee, — Wash. —, 181 Pacific 51, p. 53.

INJURY.

The term "injury," as used in the constitution of Montana, means such an injury as the law recognizes or declares to be actionable.

Shea v. North Butte Min. Co., — Mont. —, 179 Pacific 499, p. 502.

KILL.

The word "kill" as applied to an oil or gas well means to shut off the flow of oil or gas temporarily or to destroy the well entirely so that neither oil nor gas can flow.

Department of Conservation v. Louisiana Gas & Fuel Co., 144 La. —, 81 Southern 454.

ORIGINAL PACKAGE.

The term "original package" is properly applied to natural gas transported by pipe lines.

West Virginia & Maryland Gas Co. v. Towers, — Md. —, 106 Atlantic 265, p. 268.

MINING CLAIMS.

MINERAL CHARACTER OF LAND.

DEPOSIT OF LIMESTONE.

Limestone deposits that may be used as a Portland cement ingredient are not of such an exceptional nature as to warrant the adjudication as mineral of land upon which they may be shown to exist. The fact that a deposit of limestone may be used in the construction of surfacing of roads does not render the land upon which it occurs mineral land within the meaning of the mining laws.

Gray Trust Co., In re, 47 Land Decisions 18, p. 20.

ANY DISCOVERY WITHIN CLAIM SUFFICIENT.

The original discovery point in a mining location was lost by a suit on an adverse claim, but a discovery upon the remaining part of the claimed ground that was more than 300 feet distant from the side line of the claim was sufficient to evidence the mineral character of the land and to entitle the applicant to a patent for the remaining portion of his location.

Star Gold Min. Co., In re, 47 Land Decisions 38, p. 43.

LOCATION OF CLAIM.

LOSS OF DISCOVERY POINT.

A valid subsisting mining location has the effect of a grant and operates as a bar to a second location, and if title to a discovery fails so must the location which rests upon it, the loss of discovery being the loss of the location.

Star Gold. Min. Co., In re, 47 Land Decisions 38, p. 40.

See Swanson v. Sears, 224 U. S. 180.

LOCATION NOTICE.

REQUIREMENT—SUFFICIENCY.

The statutes of some of the States require that location notices shall be conspicuously posted on the claim, but the statute of Arizona (Civil Code 1913, par. 4028) requires a conspicuous monument of stone or an upright post securely fixed projecting at least 4 feet

above the ground, in which monument of stone or on which post there shall be posted a location notice. Under this statute a location notice stuck in the crevice between the rocks of the monument of stone, although hidden from view by dirt and gravel, was a substantial compliance with the statute in posting notice where there was no indication that there was any intentional concealment, although it is manifest that some precaution must be taken by a prospector to protect his location notice from destruction.

Hagan v. Dutton, — Ariz. —, 181 Pacific 578. p. 581.

SUFFICIENCY OF DESCRIPTION.

The object and purpose of a location notice is to give notice to subsequent locators, but if a subsequent locator has actual notice of a prior location he will be bound thereby although the notice may be defective. A description in the location notice was not sufficiently definite to give constructive notice of the location of a claim, but where the proposed locator was informed of an existing location and was shown the actual markings and monuments on the ground, these were sufficient to inform him of the rights of the prior locator.

Thompson v. Underwood, — Ark. —, 211 Southwestern 164, p. 165.

LIBERAL CONSTRUCTION—DESCRIPTION OF CLAIM.

Notices of the location of mining claims should be liberally construed having reference to the circumstances under which and the character of the parties by whom they are generally made. In determining the sufficiency of a location notice the most important guide is the purpose of the notice which is to identify the land claimed with reasonable certainty. The mining statute expressly provides that the description of a mining claim may be made "by reference to some natural object or permanent monument as will identify the claim located." A description of a claim in a notice that makes a well-defined ledge the center of the claim and also makes a stone monument referred to as the point of discovery the starting point for the measurements given and which defines the other dimensions of the claim by reference to the well-defined ledge on the claim with a statement of the number of feet in width on each side of the lode or vein is a sufficient description.

Sidney v. Richards, — Cal. App. —, 181 Pacific 394.

CONSTRUCTION—NATURAL OBJECTS.

Mineral deposits are frequently discovered in the wilderness remote from a Government survey and the discoveries are usually

made by men who are not equipped with proper instruments or possessed of sufficient education to enable them to correctly run lines, make measurements, and accurately describe the land sought to be located. Considering these facts a location notice is sufficient if it will impart notice to subsequent locators.

Independence Placer Min. Co. v. Knauss, — Idaho —, 181 Pacific 701, p. 703.

DISCOVERY.

ESSENTIAL TO VALIDITY.

In order to create valid rights or initiate title as against the United States to a mining location, a discovery of mineral is essential.

Union Oil Co. v. Smith, 39 Supreme Ct. Rep. 308, p. 310.

See United States Mining Statutes Annotated, 64.

TIME OF MAKING.

Discovery is the indispensable fact in a mining location and the marking and recording of the claim dependent upon it; but the order of time in which these acts occur is not essential to the acquisition from the United States of the exclusive right of possession of the discovered mineral or the obtaining of a patent therefor; but discovery may follow after location and give validity to the claim as of the time of discovery, provided the rights of third persons have not intervened.

Union Oil Co. v. Smith, 39 Supreme Ct. Rep. 308, p. 310.

See United States Mining Statutes Annotated 71.

CONDITION OF VALID LOCATION.

The discovery of mineral within the limits of a mining claim located is a necessary prerequisite to a complete and valid mining location.

Hagan v. Dutton, — Ariz. —, 181 Pacific 578, p. 580.

See United States Mining Statutes Annotated, 23, 64.

DISCOVERY BY FORMER LOCATOR—PRESUMPTION.

Discovery of valuable deposits of minerals is essential to a valid mining location but a locator need not be the first or original discoverer of mineral on the claim. He may appropriate an abandoned or forfeited discovery by locating the claim as a relocation, and it is

sufficient if he knew at the time of making his location that there had been a discovery of mineral on the location.

Hagan v. Dutton. — Ariz. —, 181 Pacific 578, p. 580.

DISCOVERY POINT MUST BE WITHIN LOCATION.

A mineral applicant must show that the discoveries were on the vein or that another discovery had been made upon the vein prior to application for patent and the discovery must be within the limits of the claim. A discovery without the limits of a claim, no matter what its proximity, does not suffice.

Star Gold Min. Co., In re, 47 Land Decisions 38, p. 40.

See Waskey v. Hammer, 223 U. S. 85, p. 91.

United States Mining Statutes Annotated, 68, 181.

DISCOVERY IN SHAFT.

The statute of Arizona (Civil Code, Par. 4030) requires a discovery shaft to be sunk within 90 days after the location.

Hagan v. Dutton, — Ariz. —, 181 Pacific 578, p. 581.

QUESTION OF FACT.

Whether or not there has been a discovery of mineral on a mining claim, within the meaning of the United States statute was a question of fact for the trial court to determine under the evidence in a controversy between rival claimants.

Hagan v. Dutton, — Ariz. —, 181 Pacific 578, p. 580.

GROUP CLAIM—DISCOVERY ON EACH CLAIM.

The act of 1903 (32 Stats. 825, Comp. Stats. Sec. 4636), does not by virtue of the proviso excuse or dispense with actual discovery of oil on each of a group of claims although the discovery work, the act of drilling a well upon one claim may have a tendency to determine the oil-bearing character of the contiguous claims. Such work does not confer upon the locator inchoate rights in the other claims of the group of which the latter was not in actual possession and upon none of which a discovery of oil had been made.

Union Oil Co. v. Smith, 39 Supreme Ct. Rep. 308, p. 312.

RIVAL MINERAL CLAIMANTS—PROOF.

In actions between rival mineral claimants the rule as to proof of the discovery of minerals is more liberal than in other actions.

Hagan v. Dutton, — Ariz. —, 181 Pacific 578, p. 580.

VEIN OR LODE.**PRESUMPTION OF EXISTENCE.**

The statute (sec. 2320, Rev. Stats.) contemplates that the claimant will locate not exceeding 1,500 feet along the discovered vein or lode, and there arises a presumption, essentially one of fact, that the located vein extends throughout the length of the claim.

Star Gold Min. Co., In re, 47 Land Decisions 38, p. 42.

OWNERSHIP OF ALL VEINS.

The locator of a mining claim is not only entitled to the discovered vein but to all other veins, lodes, and ledges apexing within the ground included in the surface location.

Star Gold Min. Co., In re, 47 Land Decisions 38, p. 42.

MARKING LOCATION.**NATURAL OBJECTS—PERMANENT MONUMENTS.**

A location notice giving the name of the claim and showing that it was tied to the junction of two named creeks, and a description showing that another claim was tied to a cabin on the first-named claim and that another named claim was tied to a flume on the first-named claim with reference to the northerly side of a named creek, must be regarded as sufficient, as the junction of the two creeks is a natural object, and the cabin and the flume are permanent monuments within the means of the mining statutes.

Independence Placer Min. Co. v. Knauss, — Idaho —, 181 Pacific 701, p. 703.
See United States Mining Statutes Annotated, 227.

ASSESSMENT WORK.**FAILURE TO PERFORM—ESTOPPEL.**

The owner of an interest in a mining claim who stood by from 1904 until 1915 and who neither performed nor paid his part of the assessment work, and contributed nothing toward the success of the mine and apparently abandoned whatever interest he had, can not, neither can his assignee, assert and reclaim an interest in the mining claim as against a relocater.

Harvey v. Laurier Min. Co., — Wash. —, 179 Pacific 864.

FORFEITURE BY COOWNER—ADVERSE POSSESSION.

A part owner of a mining claim can not forfeit his coowner's interest because of the coowner's failure to perform or to contribute to

the performance of the assessment work, where during the period of time when the annual assessment work was to be done the coowner was by the part owner insisting on forfeiture, denied permission to enter upon the claim or to contribute to the assessment work.

Becker-Franz Co. v. Shannon Copper Co., 256 Federal 522, p. 523.

GROUP CLAIMS—DISCOVERY WORK—ACT OF 1903.

The act of 1903 (32 Stats. 825, Comp. Stats. sec. 4636), provides that upon oil claims located as placer mining claims, the annual assessment work may be done upon one of a group of contiguous claims under a common ownership, provided the labor will tend to the development "or to determine the oil-bearing character of such contiguous claims." In construing this statute the United States Supreme Court said: "It is hardly necessary to say that the discovery of oil upon several contiguous claims does not render it wholly unimportant that assessment work thereafter done by the common owner upon one of the claims, in order to be credited to him as if it had been distributed among the several claims shall be of general benefit to the group. This is the object of the act, and except as the proviso specifically declares 'determination of oil-bearing character' to be of benefit to the contiguous claims, little is added to the effect of section 2324, Rev. Stats., respecting group assessment work. But we can not declare a determination of the 'oil-bearing character' of a claim upon which oil already has been discovered to be a matter so idle as to require us to seek a strained construction of the statute. In our opinion the act shows no purpose to dispense with discovery as an essential of a valid oil location or to break down in any way the recognized distinction between the *pedis possessio* of a prospector doing work for the purpose of discovering oil and the more substantial right of possession of one who has made a discovery and performs annual development work to maintain his right to the mineral until patent is obtained."

Union Oil Co. v. Smith, 39 Supreme Ct. Rep. 308, p. 312.

AFFIDAVITS OF PERFORMANCE—PERJURY.

The making of false affidavits as to the performance of assessment work on a placer claim may constitute perjury, and an indictment was sufficient without stating the particular statute under which it was made. Where the evidence for the prosecution was not sufficient alone to justify a conviction, but taken in connection with the contradictions and discrepancies in the testimony of the defendant a verdict of guilty was not disturbed on appeal.

Vedin v. United States, 257 Federal 550, p. 551.

FORFEITURE.**PROOF ON RELOCATION—BURDEN.**

Where a mining location was made upon ground alleged to be forfeited for failure to perform the annual assessment work or to make the required improvements, the burden of proving such forfeiture was upon the relocater.

Copper State Min. Co. v. Kidder, — Ariz. —, 179 Pacific 641, p. 646.

ABANDONMENT.**PROOF ON RELOCATION.**

A relocater attempting a relocation upon ground previously located has the burden of proving that the original location had been abandoned.

Copper State Min. Co. v. Kidder, — Ariz. —, 179 Pacific 641, p. 646.

RELOCATION.**EXISTING VALID LOCATION—GROUND WITHDRAWN.**

An attempted relocation of a mining claim upon a valid existing location is wholly void for the purpose of founding any right or claim to the ground. Ground withdrawn from the public domain by prior valid and subsisting location is not subject to relocation.

Hagan v. Dutton, — Ariz. —, 181 Pacific 578, p. 582.

ADOPTION OF MONUMENTS.

A person intending to relocate certain mining ground erected discovery monuments on an existing mining claim with the consent or without objection of the then owner. Such monuments could be legally adopted on a subsequent relocation of the claim, although the monuments were built at a time when the ground was not open to location. The rule is that discovery monuments existing on the ground at the time of the location may be adopted by a relocater, either by rebuilding partially existing monuments or availing himself of existing monuments by using them, and this is a compliance with the law, and the use of such monuments for the purpose of marking the boundaries of a claim is a sufficient compliance with the statute and creates a valid relocation on the performance of other requirements.

Hagan v. Dutton, — Ariz. —, 181 Pacific 578, p. 582.

ABANDONMENT OR FORFEITURE—BURDEN OF PROOF.

Where a mining location is made upon ground as abandoned, or forfeited, for failure to do the annual work or make the required im-

provement, the burden of showing such abandonment or forfeiture is upon the relocater.

Copper State Min. Co. v. Kidder, — Ariz. —, 179 Pacific 641, p. 646.

See Cunningham v. Pirrung, 9 Ariz. 288, 80 Pacific 329.

Hammer v. Garfield Min. Co., 130 U. S. 290. 19 Sup. Ct. 548.

AGREEMENT TO PROTECT—DUTY TO PAY.

Where it was claimed that the relocater of a mining claim agreed to protect the interest of a part owner of the original claim upon the payment by such part owner of the expense incurred by the relocater in the performance of the assessment work and in operating the mine, it was the duty of such part owner to offer to pay his share of such expenses before demanding and seeking to recover his interest in the relocated claim.

Harvey v. Laurier Min. Co., — Wash. —, 179 Pacific 864, p. 865.

DESCRIPTION.

SUFFICIENCY OF DESCRIPTION.

The description of a mining claim is sufficient if by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to a subsequent locator.

Independence Placer Min. Co. v. Knauss, — Idaho —, 181 Pacific 701, p. 703.

See United States Mining Statutes Annotated, 226.

POSSESSORY RIGHTS.

RIGHTS BEFORE DISCOVERY—PEDIS POSSESSIO PROTECTED.

Section 2319, United States Revised Statutes, extends an express invitation to all qualified persons to explore the public lands for valuable mineral deposits; and persons who proceed in good faith to make such explorations and enter upon vacant public lands for that purpose are not treated as trespassers, but as licensees or tenants at will. The exploration must precede the discovery of minerals, and some occupation of the land is necessary for adequate and systematic exploration, and it must follow that legal recognition of the pedis possessio of a bona fide and qualified prospector is regarded as a necessity. Such a prospector may hold the place in which he may be working against all others, having no better right, and while he remains in possession diligently working toward discovery, he is entitled for at least a reasonable time to be protected against forcible, fraudulent, and clandestine intrusions upon his possession.

Union Oil Co. v. Smith, 39 Supreme Ct. Rep. 308, p. 310.

See United States Mining Statutes Annotated, 117.

POSSESSION BEFORE DISCOVERY—EXTENT OF PROTECTION.

The United States Supreme Court conceded that the Supreme Court of California extended the rule of protection to the locator of a mining claim before discovery "not only as far as the *pedis possessio* but to the limits of the claim as located," and that under the rule established by that court the locator has the right to maintain possession as against violent, fraudulent, and surreptitious intrusion so long as he continues to occupy the land to the exclusion of others and diligently and in good faith prosecutes the work of endeavoring to discover valuable mineral thereon. But in the case recognizing this rule of the California court, the Supreme Court expressly said that the extent of the possessory right of a locator before discovery was a question not raised in the case.

Union Oil Co. v. Smith, 39 Supreme Ct. Rep. 308, p. 310.

See United States Mining Statutes Annotated, 117.

PROPERTY RIGHTS—TRANSFER.

Without a patent, the possessory right of a qualified locator of a mining claim after discovery of minerals upon the claim is a property right in the full sense, unaffected by the fact that the paramount title to the land is in the United States, and such right is capable of being transferred by conveyance, inheritance, or devise.

Union Oil Co. v. Smith, 39 Supreme Ct. Rep. 308, p. 311.

See United States Mining Statutes Annotated, 122.

EXTENT AND EFFECT.

A discovery of mineral by a qualified locator upon unappropriated public lands initiates substantial rights as against the United States and all the world. If the locator makes a record of his claim in accordance with section 2334 (U. S. Rev. Stats.), and the pertinent local laws and regulations, he has, by the terms of section 2322, an exclusive right of possession to the extent of his claim as located, with the right to extract the minerals, even to exhaust them without paying any royalty to the United States as owner and without ever applying for a patent or seeking to obtain title to the fee. The continued possessory right is subject to the performance of the annual labor as provided in section 2324, for upon the failure to do this the claim is open to relocation by others at any time before resumption of work by the original locator.

Union Oil Co. v. Smith, 39 Supreme Ct. Rep. 308, p. 311.

See United States Mining Statutes Annotated, 116.

ACTUAL OCCUPATION UNNECESSARY—ABANDONMENT AND FORFEITURE.

Actual and continuous occupation of a valid mining location based upon discovery is not essential to the preservation of the possessory right. The court's opinion reads: "The right is lost only by abandonment, as by the nonperformance of the annual labor required by section 2324."

Union Oil Co. v. Smith, 39 Supreme Ct. Rep. 308, p. 311.

NOTE: The court in this case fails to recognize the distinction between abandonment and forfeiture of a mining claim. The possessory right of the locator, the court said, "is lost only by abandonment as by the nonperformance of the annual labor." The right of possession of an unpatented mining claim may be lost by "abandonment" at any time. Abandonment has no relation whatever to the performance of the annual assessment labor. "Abandonment" may be complete at any time, but a "forfeiture" can only take place after the expiration of the statutory period for performing the annual assessment work and on failure to do the required work. The same court in the familiar case of *Lavignino v. Uhlig*, 198 U. S. 443, failed to make this distinction between abandonment and forfeiture, and the decision created some confusion among courts of the metal mining States. The error was corrected in the case of *Farrell v. Lockhart*, 210 U. S. 142, and the distinction pointed out though the former case was not expressly overruled.—Author.

See United States Mining Statutes Annotated, 254, 258, 495.

POSSESSION PROTECTED—ERROR IN LOCATION.

A person who locates a mining claim in good faith is protected in his possession of the surface marked out, although subsequent developments may show that the location of the apex of the vein was erroneous.

Star Gold Min. Co., In re, 47 Land Decisions 38, p. 42.

See *Harper v. Hill*, 159 Cal. 250, 113 Pac. 162.

MINERAL LANDS IN TOWNSITES.

Section 2386 (U. S. Rev. Stats.) provides that where mineral veins are in the possession of a locator whose possession is recognized by local authority the title to town sites shall be subject to such recognized possession and the necessary use thereof.

Golden Center of Grass Valley Min. Co., In re, 47 Land Decisions 25, p. 27.

See United States Mining Statutes Annotated, 1354.

RAILROAD RIGHT OF WAY—RELATIVE RIGHTS.

A railroad right of way over and across a mining claim as a part of a national forest was superior to the right of the mining claimant who held under his mining claim until the land was opened and who then made application and obtained patent under the homestead law.

Van Dyke v. Arizona Eastern R. Co., 248 U. S. 49, p. 52.

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CONTRACT OF SALE—FORFEITURE—RIGHT TO IMPROVEMENTS.

The owner of mining claims entered into a contract of sale by which the purchaser was to pay \$30,000.00 in instalments. The contract expressly provided that time was the essence of the contract and on failure of the purchaser to make the payments agreed upon the contract should become void and the purchaser forfeit all rights thereunder and all payments made should be forfeited as liquidated damages and the seller should take immediate possession of the property with all improvements placed thereon by the purchaser. The improvements placed upon the property claimed under the forfeiture clause in part consisted of iron water tanks, rails for the railroad tracks laid in place and a large lot of iron pipes, which were more or less attached to the freehold; and also a quantity of sundry loose mining tools, equipment and supplies useful in the operation of the mine, but in no sense improvements on the realty. The term "improvements" used in the contract has a broader significance than that accorded to the term "fixtures." Improvements within the meaning of the forfeiture clause included those things of a permanent nature which tended to increase the value of the property as a mine and to aid in the extraction of ore profitably. The articles specifically mentioned are improvements of a permanent nature which enhance the value of the realty for the uses for which it was intended. But the term does not include the loose mining tools, equipment and supplies though useful in mining operations but in no sense improvements on the realty.

Siegloch v. Bisbee, — Wash. —, 181 Pacific 51, p. 52.

See Virginia Min. Co. v. Haeder, — Idaho —, 181 Pacific 141.

ADVERSE POSSESSION—PARTITION—RECOVERY FOR ASSESSMENT WORK.

In a suit for partition of a mining claim a court of equity may direct payment by one cotenant to another of his proportionate share of assessment work made necessary to maintain the life of the claim. But this right to contribution is lost in the case where the cotenant in possession holds adversely to his cotenant and refused to permit him to enter upon the claim or to contribute his proportion of the expenses of the assessment work, as the claim for contribution is inconsistent with the prior acts of the cotenant in possession and estops him to claim compensation.

Becker-Franz Co. v. Shannon Copper Co., 256 Federal 522, p. 524.

LEASE—RECOVERY OF RENT—DEFENSE.

The locator of a mining claim leased a part of the surface for business purposes and gave the lessee the privilege of erecting certain

buildings and structures thereon. In an action to recover instalments of rent due, the lessee can not defeat a recovery on the ground that the mining location was void for the reason that no mineral was discovered within the claim, or that the locator failed to record his notice of location within the statutory period or that the locator failed to perform the assessment work during certain years, as this would permit the tenant to deny the landlord's title. If the lessor's title failed for any reason the lessee would have his remedy on the implied warranty of title.

Lynch v. Clark, — Ariz. —, 179 Pacific 960, p. 962.

POSSESSORY ACTIONS.

SUIT TO QUIET TITLE—PLEADING.

A complaint to quiet title to an unpatented mining claim is sufficient where there is an allegation in ordinary and concise terms to the effect that the plaintiff is the owner and in possession of the described property, without setting out matters of evidence or probative facts; and an allegation that the defendant claims an adverse interest or estate is sufficient without defining it.

Hammitt v. Virginia Min. Co., — Idaho —, 181 Pacific 336, p. 337.

QUIETING TITLE—DESCRIPTION OF CLAIM.

The relocater of a mining claim can not maintain an action to quiet his title as against the original locator where the original location notice contained a sufficient description of the ground sought to be located and where there was an honest attempt by the original locator to locate the claim and there was a sufficient compliance with the requirements of the law and especially where the relocater had actual knowledge of the extent of the original claim.

Sidney v. Richards, — Cal. App. —, 181 Pacific 394, p. 395.

OWNERSHIP—PLEADING.

In a suit to quiet title to a mining claim the complaint need not allege in detail the manner in which the claim was located nor the qualifications of the locator. In such a case it is only necessary to allege the ultimate fact of the complainant's interest in, or claim to, the property. Although a complaint to quiet title to a mining claim did not sufficiently describe or identify the claim, but where the complainant at the trial introduced the notices of location, together with oral testimony touching the location and description, and this evidence was admitted without objection as to the sufficiency of the complaint, it is sufficient to sustain the judgment.

Independence Placer Min. Co. v. Knauss, — Idaho —, 181 Pacific 701, p. 702.

MINERAL CLAIMANTS—DISCOVERY RULE.

In a possessory action between two mineral claimants the rule respecting the sufficiency of discovery of valuable mineral deposits is more liberal than when it is between a mineral claimant and one seeking an agricultural entry. The reason of this is that where land is sought to be taken out of the category of agricultural land the evidence of its mineral character should be reasonably clear, while in respect to mineral lands in the controversy between claimants the question is simply which is entitled to priority.

Hagan v. Dutton, — Ariz. —, 181 Pacific 578, p. 580.

PROOF OF DISCOVERY IN DISCOVERY SHAFT.

In an action between rival claimants for the possession of a mining claim the issue as to whether the evidence had disclosed mineral in place had reference to a discovery of mineral in the discovery shaft which the statute of Arizona (Civil Code, Paragraph 4030, Subdiv. 2), requires to be sunk within 90 days after the location.

Hagan v. Dutton, — Ariz. —, 181 Pacific 578, p. 581.

PROOF OF LOCATION ON UNOCCUPIED LAND.

In an action for the possession of a mining claim it is sufficient where the complainant testified without objection that his claim was located on unappropriated government lands. Such proof is sufficient to sustain a finding of the jury in favor of the complainant.

Thompson v. Underwood, — Ark. —, 211 Southwestern 164, p. 165.

FAILURE TO ASSERT—LACHES.

The fact that mining property is more subject to sudden and violent fluctuations of value than other property requires persons having claims to mining property to use the utmost diligence in enforcing them and any unreasonable failure to do so would be fatal. There is no class of cases in which the doctrine of laches has been more relentlessly enforced than in possessory actions for mining claims.

Harvey v. Laurier Min. Co., — Wash. —, 179 Pacific 864, p. 165.

LESSOR MAY SUE TRESPASSER FOR POSSESSION.

The locator of a valid mining claim upon unappropriated government lands may maintain ejectment for the possession of the claim against a trespasser or against a person in unlawful possession although he had leased or granted to another the right to enter

upon and mine the claim on a royalty basis. The execution of the lease in no way affected his right to maintain ejectment for the possession of the land against a trespasser or one holding it unlawfully.

Thompson v. Ulderwood. — Ark. —, 211 Southwestern 164, p. 165.

COAL LOCATIONS.

SALE BEFORE ENTRY—SUBSEQUENT TITLE INCURS TO PURCHASER.

A qualified locator filed his coal declaratory statement giving him a right to make entry of certain coal lands. Before completing the entry he conveyed the land by deed to a purchaser and under an agreement completed his entry and after a space of more than three years obtained a patent and delivered the same to the purchaser. The legal title to the land did not pass at the time of the original conveyance by the entryman, but when he received his patent and delivered it to his grantee and received the remainder of the purchase price certainly no title still remained in him which he could assert against his grantee and there was no title which he could convey to a third person and particularly to a third person who was not an innocent purchaser for value. Having no title at the time he conveyed for a full and valuable consideration, when he subsequently acquired title by patent, such title inured to his grantee.

Ketchum v. Pleasant Valley Coal Co., 257 Federal 274, p. 273.

ADVERSE POSSESSION.

A coal land entryman after filing a declaratory statement conveyed the land to a purchaser and under an agreement completed his entry, obtained a patent and delivered the same to the purchaser. The purchaser took possession of the property under the conveyance before the issuance of the patent and held possession for about thirty years, paid the taxes, erected a store house, trestle, coal tipple, dwellings for employees, offices, power house, tram line, coke ovens, railroad tracks and other improvements at an expenditure of about a quarter of a million dollars. The possession was held and the improvement made with the knowledge of the original grantor and of the adverse claimant. A court of equity will grant no relief under such circumstances.

Ketchum v. Pleasant Valley Coal Co., 257 Federal 274, p. 277.

APPLICATION FOR PATENT—PAYMENT OF PURCHASE PRICE.

An applicant for a patent for a coal location may at his option pay for the land at the time of the filing or at any time thereafter up to fifteen days from and after receipt of notice from the Register.

But if payment is not made at the time of filing the application and an increase in value subsequently occurs the applicant will be required to pay the new or higher price.

Thomas, *In re*, 47 Land Decisions 43, p. 44.

See United States Mining Statutes Annotated, 748.

PATENT TO COAL LANDS—COLLATERAL ATTACK.

An applicant for coal land filed a coal declaratory statement giving him a right to make entry of the land, but before he made entry he conveyed the land by deed to a purchaser. Subsequently the applicant made application to make entry and to purchase the land from the Government and a patent was thereafter issued to him and thereupon he delivered the patent to the purchaser. This arrangement was pursuant to an agreement at the time the applicant executed the deed to the land. The patent issued to the original applicant was not void, but at most voidable and the Government alone could complain of the alleged invalidity.

Ketchum v. Pleasant Valley Coal Co., 257 Federal 274, p. 275.

OIL LOCATIONS.

RIGHTS PRIOR TO DISCOVERY.

A locator of mineral lands has no legal status or right to the property against the Government prior to discovery, except such as is given him by the act of June 25, 1910, known as the Pickett Act (36 Stat. 847, Comp. Stats. Secs. 4523-4525). Prior to discovery his right is a mere possessory one, protected and recognized against forcible or clandestine entry by a third person while he is in good faith making a discovery, although open to entry of others by legal means for the purpose of location.

United States v. Rock Oil Co., 257 Federal 331, p. 33.

ASSESSMENT WORK—PERFORMANCE ON GROUP CLAIMS.

The act of Congress approved February 12, 1903 (32 Stats. 825, Comp. Stats. Sec. 4636), provides that where oil lands are located as placer mining claims the annual assessment labor may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation not exceeding five claims. The terms "assessments" and "annual assessment labor" used in this statute refer to the annual labor required by section 2324, Revised Statutes, being commonly called and known by miners as the "annual assessment" or the "assessment work" as described in many judicial

opinions and in at least two acts of Congress. The annual "assessment work" has nothing to do with locating or holding a claim before discovery but is a condition subsequent prescribed by Congress to be performed in order to preserve exclusive right to the possession of a valid mineral land location. The provision in the act of 1903 permitting annual assessment labor upon any one of a group of oil claims lying contiguous and owned by the same person indicates the legislative purpose that the necessary assessment work if done upon one of the group should have the same effect as if distributed among the several claims; and this effect is that of preserving the exclusive right of possession and enjoyment conferred by section 2322 (Rev. Stats.).

Union Oil Co. v. Smith, 39 Supreme Ct. Rep. 308, p. 311.
See United States Mining Statutes Annotated, 245.

GROUP CLAIMS—ASSESSMENT WORK.

The privilege of performing the assessment work upon one of a group of oil claims lying contiguous and owned by the same person or corporation as provided for in the act of February 12, 1903 (32 Stats. 825), did not originate with that act. The economy of operating contiguous mining claims by a single system has been recognized from an early period. Section 2324 (Rev. Stats.), expressly provides that where claims are held in common the expenditure may be made upon any one claim, but it is the rule that the work must be done for the common benefit or for the purpose of developing all the claims: and the act of 1903 contains the proviso that the labor will benefit or tend to the development of the contiguous claims.

Union Oil Co. v. Smith, 39 Supreme Ct. Rep. 308, p. 311.
See United States Mining Statutes Annotated, 245.

WITHDRAWAL OF OIL LANDS—RIGHTS OF PERSONS IN POSSESSION.

In November, 1908, paper locations or declaratory statements were posted by one person in the name of sundry persons claiming the several tracts under the placer mining law, they being at the time vacant, unoccupied mineral lands of the United States. After some transfers and consolidation of claims, the associates entered into a contract with an oil company for the development of one particular property and the oil company under the contract was diligently engaged in work leading to discovery on September 27, 1909, when the land was included in the presidential withdrawal order of that date. Work of development continued after the withdrawal and oil was discovered in December, 1909, involving an expense of a large amount of money. The locations were alleged to be fraudulent and

void, because they were made for the purpose of enabling one of the associates to acquire more land in a single location than the law permits. But there could be no reason why the persons succeeding to the rights of the original locators should not be deemed to be bona fide occupants at the date of withdrawal within the meaning of the Pickett Act (act June 25, 1910, 36 Stat. 847, Comp. Stats. Secs. 4523-4525), where they innocently obtained possession in the first instance from some one who was attempting to acquire more land than the law permitted. Their right was not deraigned from, nor did it depend upon a prior location but upon the terms of the Pickett Act. They were occupying and holding in their own right and as persons lawfully entitled to acquire the property under the mining laws. Their possession was not tainted with the fraud of the prior attempted locator whom they did not represent and in whose interest and for whose benefit they were not holding.

United States v. Rock Oil Co., 257 Federal 331, p. 332.

ADVERSE CLAIMS.

TIME FOR FILING—FAILURE TO FILE WITHIN STATUTORY PERIOD.

An adverse claim that was not filed within the period prescribed by the statute can not be considered.

Ebner Gold Min. Co. v. Hallum, 47 Land Decisions 32, p. 33.
See United States Mining Statutes Annotated, 377, 716, 717.

TIME FOR FILING IN ALASKA.

By the Act of June 7, 1910 (36 Stats. 459), adverse claims to applications for patents for mining claims in Alaska may be filed at any time during the period of publication or within eight months thereafter.

Ebner Gold Min. Co. v. Hallum, 47 Land Decisions 32, p. 33.

LOSS OF DISCOVERY POINT.

Where by a judgment in an adverse suit an applicant for patent lost that part of his location containing the original discovery, it is essential to entitle him to a patent to the remainder to show a discovery of minerals upon the remaining portion of his claim and that the discovery was made prior to the date of his application for patent.

Star Gold Min. Co., In re, 47 Land Decisions 38, p. 43.

PATENTS.

MINERAL LANDS IN TOWNSITE.

A patent issued under the general townsite laws does not convey the title to any lands known to be valuable for mineral at the date of the townsite entry or to any valid mining claim held under the mining laws at the date of such entry.

Golden Center of Grass Valley Min. Co., In re, 47 Land Decisions 25, p. 27.
See Leland v. Townsite of Saltee, 32 Land Decisions 211.

MINERAL LANDS—LOCATION IN TOWNSITE—HEARING—PRIMA FACIE CASE.

On application for a mineral patent by a claimant of land included in a townsite the claimant is entitled to a hearing as to the mineral character of the land when he makes a prima facie showing to the effect that the land was known to be mineral or was held under a valid mineral location at the time of the townsite entry.

Golden Center of Grass Valley Min. Co., In re, 47 Land Decisions 25, p. 27.

FAILURE OF PROOF TO SHOW DISCOVERY WITHIN LOCATION.

A patent for a mining claim will not issue where the land upon which are situated the discovery shaft and improvements is excepted therefrom and the proof fails to show the existence of mineral on the claim as entered.

Star Gold Min. Co., In re, 47 Land Decisions 38, p. 42.
See Antediluvian Lode & Millsite, In re, 8 Land Decisions 602.
Lone Dane Lode, In re, 10 Land Decisions 53.

LOSS OF PART OF CLAIM—MINERALS WITHIN LIMITS OF CLAIM.

The fact that a patented subsequently located mining claim included the original discovery on which a prior claim was based did not necessarily defeat the right of the first locator to a patent to the remainder of his claim, if other veins had been discovered on such remaining portions and if there was no actual intent to abandon the remaining part of the claim.

Star Gold Min. Co., In re, 47 Land Decisions 38, p. 41.

CONFIRMATION OF MINERAL ENTRY.

An entry under the mining laws is not one made under the homestead law, timber culture, desert land, or preemption, law, and is not

within the proviso to Section 7 of the act of March 3, 1891 (26 U. S. Stats. 1095).

Parmer, In re, 47 Land Decisions 16.

POTASH WITHDRAWALS.

Section 1 of the Act of July 17, 1914 (38 Stats. 509), permits of the entry of lands withdrawn or classified as potash, "with a view of obtaining or passing title with the reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable together with the right to prospect for, mine, and remove the same." Section 2 provides that the patent shall contain reservations to the United States of the deposits on account of which the lands patented were withdrawn or classified.

Instructions, In re, 47 Land Decisions 21.

POTASH LANDS NOT EMBRACED IN LEASES.

Under the act of October 2, 1917 (40 Stats. 297), the surface of public lands in and adjacent to Searls' Lake, California, classified as valuable for potash and not embraced in any existing leases, may be patented with the reservation of the mineral deposits to the United States.

Instructions, In re, 47 Land Decisions 21, p. 23.

APPLICATION FOR MILLSITE—NOTICE—PRESUMPTION.

The effect of a notice of an application for a patent for a millsite is, in the absence of an adverse claim duly filed, to give rise to the presumption that no adverse claim exists and that the applicant is entitled to a patent.

Elbner Gold Min. Co. v. Hallum, 47 Land Decisions 32, p. 34.

See United States Mining Statutes Annotated, 436.

MILL SITE.

APPLICATION FOR PATENT.

Application for a patent for a mill-site claim may be embraced and included in an application for a patent for the vein or lode with which the mill site is used or occupied for mining or milling purposes.

Elbner Gold Min. Co. v. Hallum, 47 Land Decisions 32, p. 34.

See United States Mining Statutes Annotated, 597.

NOTICE OF APPLICATION—EFFECT.

Notice of the application for a mill site must be accorded the same force and effect as would be given a notice for an application for a vein or lode.

Ebner Gold Min. Co. v. Hallum, 47 Land Decisions 32, p. 34.

ADVERSE PROCEEDINGS.

Mill sites have been recognized as proper subjects for adverse proceedings and adverse suits respecting them will be determined by the courts.

Ebner Gold Min. Co. v. Hallum, 47 Land Decisions 32, p. 35.

See *Durgan v. Redding*, 103 Federal 914.

Shafer v. Constans, 3 Mont. 369.

Cleary v. Shiffich, 28 Colo. 362, 62 Pacific 59.

Helena, etc., Co. v. Daly, 36 Land Decisions 144 (explained).

CONFLICTING RIGHTS—ADVERSE PROCEEDINGS.

A person claiming an adverse interest in a mill site must, in order to protect his rights, give the required notice and institute adverse proceedings in the proper court within the statutory period. Such proceedings properly instituted constitute a bar to further action by the Department until the adverse claim has been decided.

Ebner Gold Min. Co. v. Hallum, 47 Land Decisions 32, p. 35.

STATUTES RELATING TO MINING OPERATIONS.

CONSTRUCTION, VALIDITY AND EFFECT.

"PERSONAL" INJURY—"INJURIES RESULTING IN DEATH"—MEANING.

The statute of Arkansas (Acts 1909, No. 202) provides that no stay shall be allowed upon a judgment for a personal injury or injuries resulting in death caused by negligence or default of another. There is a legal distinction between the meaning of the term "personal injury" and the words "injuries resulting in death." There is nothing in the language of the statute to indicate that the words were used by the legislature in other than their common or legal acceptation. The conjunction "or" between the term "personal injury" and the words "injuries resulting in death," thus join as alternative terms expressing unlike things or ideas, and the words that follow, "caused by negligence or default of another," relate to or modify both terms. It appears that the court intends to hold that the statute does not authorize a stay of a judgment recovered by a miner against a mining company for personal injuries.

Fernwood Min. Co. v. Pluma, — Ark. —, 213 Southwestern 397, p. 398.

DUTIES IMPOSED ON OPERATOR.

DUTIES—AUTHORITY.

The statute of Illinois imposes the duty upon the mine examiner to visit the working places of the miners and to sound the roof with a sounding rod and to place a conspicuous mark on the coal. If a dangerous condition exists in a working place in a mine, the mine examiner has no authority to determine that the place is not dangerous contrary to the fact, and the mine operator can not excuse himself for a failure on the part of the mine examiner to mark the place on that ground.

Eichern v. St. Louis & O'Fallon Coal Co., — Ill. —, 123 Northeastern 603, p. 605.

See El Dorado Coal Co. v. Swan, 227 Ill. 586, 81 Northeastern 691.

INSPECTION OF MINE—MARKING DANGEROUS PLACES.

A miner was killed by a fall of rock from the roof of the mine where he was loading coal into a car. On the trial of the action for damages the evidence showed that on the morning of the accident

and on the day following the firing of shots in the miner's working place the mine examiner inspected the room and left his visitation mark, but made no mark of a dangerous condition. The examiner sounded the roof with the sounding rod the statute requires a mine examiner to use, and marked the place. Under this evidence, to justify a recovery, it must be proved that a dangerous condition existed at the time of the visit of the mine examiner and that he wilfully failed and omitted to make the mark required by the statute as a warning for miners to keep out.

Elchorn v. St. Louis & O'Fallon Coal Co., — Ill. —, 123 Northeastern 603, p. 604.

CONSTRUCTIVE NOTICE OF GASEOUS CONDITIONS.

Where a portion of a mine was found to be gaseous and was closed for some 10 days before operations were resumed the lapse of time is sufficient to bring home constructive notice to the operator of the gaseous condition of the mine and to render him liable for the death of a miner caused by an explosion of gas produced by a spark from an electric locomotive.

Jaras v. Wright, — Pa. —, 106 Atlantic 798, p. 800.

See *Watson v. Monongahela River Consol. Coal & Coke Co.*, 247 Pa. 469, 93 Atlantic 495.

McCollow v. Pennsylvania Coal Co., 270 Pa. 27, 95 Atlantic 380.

DUTY OWING TO MINER.

The Pennsylvania Mining Act of 1911 (P. L. 798), imposes upon mine operators the duty of not operating electric locomotives through any gaseous portions of a mine: as the statute imposes this duty upon an operator, the operator in turn owes to the miner a duty of not so running electric locomotives. Under this statute a mine operator was liable for the death of a miner caused by an explosion of gas from an electric spark produced while running an electric locomotive through a gaseous portion of a mine.

Jaras v. Wright, — Pa. —, 106 Atlantic 798, p. 799.

STATUTE REQUIRING BATHHOUSE—CONSTRUCTION—COMPLIANCE WITH STATUTE.

The statute of Oklahoma (Session Laws 1913, Chap. 125) requires all coal-mine operators, where 10 or more miners are employed, to provide a suitable building of sufficient size to accommodate the miners employed and to provide the same with lockers, lights, heat, hot and cold water and shower baths, and to maintain the same in good and sanitary condition. A mine operator constructed such a bathhouse with the entire floor of concrete and with a basin about

6 feet square gradually sloping to the center and some 6 inches lower in the center than at the outer edge with a drain pipe in the center of the basin for drainage. A miner, while taking a shower bath, slipped and fell upon the concrete floor breaking his arm and sustaining permanent injuries, for which he sued. The bathhouse was constructed and maintained in substantial compliance with the statute, and there was nothing to show that the basin was so constructed as not to be reasonably safe to an ordinarily prudent person and it was free from the appearances of danger to an ordinarily prudent person using it for bathing purposes. Under such state of facts there could be no recovery against the mine operator.

Rock Island Coal Min. Co. v. Taylor, — Okla. —, 182 Pacific 81, p. 82.

VIOLATION BY OPERATOR.

WILFUL FAILURE TO COMPLY—MEANING.

A wilful failure to comply with the Illinois mining statute as used in the statute means a conscious failure to perform a duty enjoined by the statute. No question of good faith or bad faith, good intent or evil intent is involved, but if there is a conscious failure to make the examination required by the statute or to mark a dangerous condition when found, the mine operator is liable for any resulting injury.

Eichorn v. St. Louis & O'Fallon Coal Co., — Ill. —, 123 Northeastern 603, p. 604.

See Mertens v. Southern Coal Co., 235 Ill. 540, 85 Northeastern 743.

Peebles v. O'Gara Coal Co., 239 Ill. 370, 88 Northeastern 166.

WILFUL FAILURE TO COMPLY WITH STATUTE.

The mining statute of Illinois imposes certain duties upon a mine operator and makes him liable for a wilful failure to comply with its terms. The statute requires a mine examiner to inspect or examine the working places and make a visitation mark on the coal. Where a mine examiner made a proper examination and left his visitation mark and no dangerous condition was discoverable by such examination, there was not a wilful failure to make an examination and mark dangerous conditions.

Eichorn v. St. Louis & O'Fallon Coal Co., — Ill. —, 123 Northeastern 603, p. 604.

MARKING DANGEROUS PLACES—MISTAKE IN JUDGMENT.

A mine operator's liability under the Illinois statute does not rest upon the ground that there was any good faith or bad faith, or that there was no danger in the mine, but upon the ground that he has,

knowing the facts which make the mine dangerous, failed to have the statutory marks properly placed in the mine. When a mine operator is advised of the conditions in the mine, he must place, if it is dangerous, statutory marks, and if he fails to do so he acts on his own responsibility and can not excuse himself because he or his mine examiner or manager thought the mine safe.

Eichorn v. St. Louis & O'Fallon Coal Co., — Ill. —, 123 Northeastern 693, p. 605.

See *Aetius v. Spring Valley Coal Co.*, 246 Ill. 32, 92 Northeastern 579, 138 Am. St. 221.

WANT OF LEGAL EXCUSE.

There is no legal excuse on the part of a mine operator for a failure to obey the absolute statutory requirement prohibiting the running of electric locomotives through the gaseous portions of a mine.

Jaras v. Wright, — Pa. —, 106 Atlantic 798, p. 800.

KNOWLEDGE OF NATURE AND CONDITION OF ROOF.

The fact that a mine examiner examined the roof of a miner's working place and tested it with a sounding rod as required by the statute and marked the place as safe, was not, as a matter of law, sufficient to relieve the mine operator from liability where the evidence showed that the slate in the roof was brittle and of a kind, character and composition which is liable to fall at any time without notice, although it may appear to be solid; that sometimes loose slate of that kind would fall after the coal had been taken out and sometimes it would not; that it was what was called "rotten" slate that might stay up for some time or fall without warning, and that there was always danger of its falling. This evidence showed the condition of the roof where the slate although solid was liable to fall at any time, and therefore the condition was dangerous.

Eichorn v. St. Louis & O'Fallon Coal Co., — Ill. —, 123 Northeastern 693, p. 606.

NEGLIGENCE OF OPERATOR AND MINE FOREMAN.

A mine operator is liable for the violation of a statute where the injury complained of was caused by the concurring negligence of the operator and of the mine foreman.

Jaras v. Wright. — Pa. —, 106 Atlantic 798, p. 800.

EXPLOSION FROM ELECTRIC SPARK.

The Pennsylvania Mining Act of 1911 (P. L. 798), prohibits electric haulage by locomotives operated from trolley wires in any gaseous portions of mines except upon intake air. A violation of

this statute in permitting the running of a trolley pole along a highly charged trolley wire through a gaseous portion of a mine by which an explosion occurred, causing the injuries complained of must be regarded as the proximate cause of the injuries for which the mine operator is liable.

Jaras v. Wright. — Pa. —, 106 Atlantic 798, p. 799.

SUPERIOR—OBEDIENCE TO ORDERS.

MINER OBEYING ORDERS—PROXIMATE CAUSE.

The statute of Alabama (Code 1907, sec. 3910) gives a miner the right to recover for injuries received while obeying orders from a superior. The orders of any such superior in the obedience of which a miner is injured must have been negligently given and the obedience on the part of the miner must have been the proximate cause of the resulting injury. Under this rule an electrician was not entitled to recover for injuries, where while riding on a car in a mine he was directed by a superior to alight at a certain point and in obedience to the order he alighted safely from the moving car, but the superior while himself alighting from the car was caught by a projecting bolt and thrown against the electrician, knocking him down and under the car, by reason of which he received the injuries complained of. The obedience on the part of the electrician to the order of the superior was clearly not the proximate cause of the injuries complained of and he could not recover under a charge of obeying the negligent order of his superior.

Woodward Iron Co. v. Gamble. — Ala. —, 81 Southern 810, p. 811.

FELLOW-SERVANT RULE—DEFENSE ABROGATED.

FELLOW-SERVANT RULE—CHANGE BY STATUTE.

The rules respecting an employer's responsibility to one employee for the negligence of another are subject to legislative change.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 556.

DEFENSE ABOLISHED.

A coal-mine operator who has not elected to operate under the Kentucky Workmen's Compensation Act can not defend an action for damages by an injured miner on the ground of the negligence of a fellow servant.

West Kentucky Coal Co. v. Smithers, — Ky. —, 211 Southwestern 580.

EFFECT ON CONTRIBUTORY NEGLIGENCE.

STATUTORY REGULATION.

The rules respecting contributory negligence are subject to legislative change and an employer may be deprived of such defense.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 556.

LEGISLATURE MAY ABOLISH CONTRIBUTORY NEGLIGENCE AS A DEFENSE.

The legislature may abolish or modify the technical defense of contributory negligence without transcending any constitutional guaranty.

Shea v. North-Butte Min. Co., — Mont. —, 179 Pacific 499, p. 503.

DEFENSE ABOLISHED.

A coal mine operator who has not elected to operate under the Kentucky workmen's compensation act can not defend an action for damages by an injured miner on the ground of contributory negligence.

West Kentucky Coal Co. v. Smithers, — Ky —, 211 Southwestern 580.

KNOWLEDGE OF DANGER—REMAINING IN EMPLOYMENT.

Under the statute of Alabama (Section 3910 Code) a miner merely remaining in the service of a mine operator with knowledge of a dangerous condition does not make him guilty of contributory negligence. But the statute does not mean that the employee may not be guilty of contributory negligence, such as to prevent his recovery as for negligence under the statute; but it provides that merely remaining in the service after the knowledge of the defect or negligence causing the injury shall not prevent a recovery. Other acts, or even omissions to act may constitute contributory negligence under the statute as well as any other cases of negligence. The statute does not and was not intended to abolish or deny the defense of contributory negligence.

S. S. Steel & Iron Co. v. White, — Ala. —, 82 Southern 96, p. 97.

EMPLOYERS' LIABILITY ACT—PLEADING.

A motorman in a mine was injured while operating an electric car by reason of a switch being improperly turned. His complaint for damages was sufficient where it alleged that the defendant, its agents and servants, negligently turned the switch. Under the Texas employers' liability act (*Vernons Sayles Ann. Stats. 1914, Arts. 5246h*

et seq.) a mine operator who is subject to the act but who is not qualified is denied the defense of the negligence of a fellow servant, and therefore no allegation was required to the effect that the employee who turned the switch was acting within the scope of his employment.

Texas & Pacific Coal Co. v. Sherbley, — Tex. Civ. App. —, 212 Southwestern 758, p. 760.

EFFECT ON ASSUMPTION OF RISK.

POWER OF LEGISLATURE TO ABOLISH DEFENSE.

The legislature may abolish or modify the technical defense of assumption of risk without transcending any constitutional guaranty.

Shea v. North-Butte Min. Co., — Mont. —, 179 Pacific 490, p. 503.

DEFENSE ABOLISHED.

A coal mine operator who has not elected to operate under the Kentucky workmen's compensation Act can not defend an action for damages by an injured miner on the ground that the miner assumed the risk.

West Kentucky Coal Co. v. Smithers, — Ky. —, 211 Southwestern 580.

KNOWLEDGE OF DANGER—REMAINING IN EMPLOYMENT.

The statute of Alabama (Section 3910 Code) provides that in no event shall the servant be held to have assumed the risk by remaining in the service after knowledge of the defect unless it was the servant's duty to remedy the defect.

S. S. Steel & Iron Co. v. White, — Ala. —, 82 Southern 96, p. 97.

RISK ASSUMED BY EMPLOYER—INDEMNITY.

The Arizona Workmen's Compensation Act provides that the consequences of a personal injury to an employee attributable to the inherent dangers of the occupation shall be assumed not wholly by the particular employee upon whom the personal injury happens to fall: but to the extent of compensation in money awarded in a judicial tribunal according to the ordinary processes of law the risk shall be assumed by the employer, and leave the employer to charge it up, so far as he can, as a part of the cost of his product and to make allowance for it, so far as he can, in a reduced scale of wages. The state legislature has come to this resolution in the course of

regulating the conduct of those hazardous industries in which human beings in the pursuit of a livelihood must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him. The rule being based upon reasonable grounds affecting the public interest, being established in advance and applicable to all alike under similar circumstances, there is no infringement of the fundamental rights protected by the fourteenth amendment.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 533, p. 558.

COMPENSATION—RATE OF WAGES.

An employer, if required by statute to assume the pecuniary loss arising from injury to an employee, may take this into consideration in fixing the rate of wages. In addition to this he has an opportunity which the employee has not to charge any such loss as a part of the cost of the product of the industry.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 533, p. 557.

EMPLOYERS' LIABILITY ACTS.

ARIZONA EMPLOYERS' LIABILITY LAW—CONSTRUCTION AND CONSTITUTIONALITY.

The Arizona Employers' Liability law is not unconstitutional on the ground that it deprives an employer of property without due process of law, or because it denies to him the equal protection of the law, on the ground that it imposes a liability without fault and without equivalent protection.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 533, p. 556.

EMPLOYERS' LIABILITY ACT—POWER OF LEGISLATURE.

The rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of employment are not beyond alteration by the legislature in the public interest. No person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit. Excluding arbitrary and unreasonable changes, liability may be imposed upon an employer without fault and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 533, p. 556.

ARIZONA EMPLOYERS' LIABILITY LAW—CONSTITUTIONALITY—NOVELTY OF LAW.

The fact that the Employers' Liability Act of Arizona is novel in its extensive scheme for compensating injuries does not render it unconstitutional. The novelty is not a constitutional objection since under constitutional forms of government each State may have a legislative body endowed with authority to change the laws. The States are left with a wide range of legislative discretion notwithstanding the fourteenth amendment.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 555.

ARIZONA EMPLOYERS' LIABILITY ACT—LIMITATION ON LIABILITY—DUE PROCESS OF LAW.

The responsibility of an employer under the Arizona Employers' Liability Act is not unlimited except as it is true of every action for compensatory damages where the amount varies in accordance with the nature and extent of the damages for which compensation is made. The fact of the danger of juries returning extravagant verdicts has a corrective in the authority of the court to set them aside. It can not be urged against the validity of this law that in submitting a controversy between litigants to the courts for trial according to long established modes and with a constitutional jury to determine the facts and assess compensatory damages there is a denial of "due process of law."

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 557.

BURDENS OF HAZARDOUS OCCUPATIONS—POWER OF STATE TO IMPOSE.

The rule of the common law requiring an employee to assume all consequences of personal injuries arising out of the ordinary dangers and normal conditions of a hazardous occupation and to secure his indemnity in advance in the form of increased wages is incompatible with the public interest because the probability of injury occurring to a particular employee, and the nature and extent of such injuries are so contingent and speculative that it is impracticable for either the employer or employee approximately to estimate in advance how much allowance should be made for them in the wages to be paid; and were the proper allowance made it is not to be expected that the average working man will set aside out of his wages a proper insurance against the time when he may be injured or killed. So thus recognizing that injuries to workmen constitute a part of the unavoidable cost of hazardous industries the State may require that it be assumed by the one in control of the industry as employer just as he pays other items of costs. The State may provide by statute

that an employer shall not make profit from the labor of his employees and leave the injured ones and the dependents of those whose lives are lost, through accidents due to the conditions of the occupation, to be a burden upon the public.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 557.

HAZARDOUS OCCUPATION—CONSTITUTIONALITY—WHO MAY QUESTION.

The Arizona Employers' Liability Act is expressly made applicable to hazardous occupations. The fact that the act may be extended by construction to nonhazardous occupations is a question that can not be raised by a mine operator whose occupation by the act is expressly declared to be hazardous and which is undisputably hazardous. But aside from this employers in nonhazardous industries are in little danger from the act as it imposes liability only for accidental injuries attributable to the inherent dangers of the occupation.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 559.

COMPENSATION—METHOD OF AWARDED—VALIDITY OF STATUTE.

Where a State recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result is for the State itself to determine. Whether the compensation should be paid in a single sum after judgment is recovered as required by the Arizona Employers' Liability Act as under the common law system in the case of a judgment based upon negligence, or whether it would be more prudent to distribute the award by installment payments is likewise for the State to determine. The fact that the Arizona Employers' Liability Law permits a recovery in an action in the form of compensatory damages and deprives an employer of certain defenses, does not render the act unconstitutional.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 558.

RESPONSIBILITIES OF EMPLOYERS—POLICE REGULATIONS.

The State may prohibit and punish self-maiming and attempts at suicide and may prohibit a man from bartering away his life or personal security; and the authority to prohibit contracts made in derogation of a lawfully established policy of the State respecting compensation for actual death or disabling personal injuries is

equally clear. One ground of the State's concern with the continued life and earning power of an individual is its interest in the prevention of pauperism with its comitants of vice and crime. Laws regulating the responsibilities of employers for the injury or death of employees arising out of employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 557.

APPLICATION—FIVE MEN LAW.

Where the uncontradicted evidence showed that at the time of an injury to a miner, the mine operator was working 250 or more miners, an instruction to the effect that if the coal company was employing five or more men in its business of coal mining then the employers' liability act applied to the case, is not erroneous.

Deep Vein Coal Co. v. Ward, ——— Ind. App. ———, 123 *Northeastern* 228, p. 229.

ARIZONA EMPLOYERS' LIABILITY LAW—CONSTRUCTION—ASSUMPTION OF RISK.

The Arizona Employers' Liability Law, in respect to certain specified employments designated as inherently hazardous to workmen imposes upon the employer, without regard to the question of his fault or that of any person for whose conduct he is responsible and liable in compensatory damages, excludes all such as are speculative or punitive for accidental injury or death of an employee arising out of and in the course of the employment and due to a condition or conditions of the occupation, in cases where such injury or death shall not have been caused by the negligence of the employee. The statute in effect requires the employer instead of the employee to assume the peculiar risks of injury or death of the employee attributable to hazards incident to the employment and due to its conditions and not to the negligence of the employee killed or injured. The matter of the assumption of risks of employment and the consequences to flow therefrom have been regulated by the common law with statutory modification, but these rules of law are not placed by the fourteenth amendment beyond the reach of the State's power to alter them as rules of future conduct and tests of responsibility through legislation designated to promote the general welfare so long as it does not interfere arbitrarily and unreasonably and in defiance of natural justice with the rights of employers and employees to agree between themselves respecting the terms and conditions of employment.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 556.

ASSUMPTION OF RISK—REMAINING IN SERVICE.

Under the Alabama Employers' Liability Act it can not be held in any event that an injured servant assumed the risk of known dangers by remaining in the service after knowledge of defects in the ways, works, and machinery, unless it was the duty of the servant to remedy the defect.

S. S. Steel & Iron Co. v. White. — Ala. ——— 82 Southern 96, p. 97.

CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Under the Employers' Liability Act of Alabama, the burden of proof on the issue of contributory negligence is on the mine operator.

S. S. Steel & Iron Co. v. White. — Ala. ——— 82 Southern 96, p. 97.

DEFENSES ABOLISHED.

Under the Employers' Liability Act of Texas, an employer and a coal mine operator who is subject to the act but who has not qualified, is denied the defense of contributory negligence, negligence of a fellow employee, or assumed risk.

Texas & Pacific Coal Co. v. Sherbley. — Tex. Civ. App. —, 212 Southwestern 758, p. 760.

EMPLOYMENT OF INCOMPETENT SERVANTS—KNOWLEDGE OF INCOMPETENCY.

In order for an injured miner to recover from a mine operator for negligence in the employment of an inexperienced and incompetent employee, it is necessary to allege and prove that the mine operator knew of the inexperience and incompetency of the employee, or that he should have known of it.

Texas & Pacific Coal Co. v. Sherbley. — Tex. Civ. App. —, 212, Southwestern 758, p. 760.

INCOMPETENCY AND INEXPERIENCE—LIABILITY.

A coal mine operator is liable under the Texas employers' liability act for the negligent acts of his employees committed within the scope of their authority, regardless of any care used in selecting the employees, and recovery may be had for the negligence of the employer in hiring an inexperienced and incompetent employee.

Texas & Pacific Coal Co. v. Sherbley. — Tex. Civ. App. —, 212, Southwestern 758, p. 760.

DEFECTS IN WAYS, WORKS, AND MACHINERY.

A complaint in an action under the Alabama Employers' Liability Act claimed damages as for a defect in the ways, works, machinery,

etc., of the defendants' ore mine. The defect complained of was thus described: "Said overhead timber was defective and said defect consisted in this—said timber had been permitted to sag or hang down and protrude over the track." The evidence tended to prove the allegation and that it proximately contributed to the injuries complained of and was sufficient to entitle the plaintiff to recover damages.

S. S. Steel & Iron Co. v. White, — Ala. —, 82 Southern 96, p. 97.

NEGLIGENCE OF OPERATOR AND OF MINE BOSS—PLEADING.

A complaint by a miner for damages for injuries received while working in a mine proceeded upon the theory that the injury was the result of the negligence of the mine operator. The negligence of the mine boss and of the day men, whose duty it was to remove slate and other material from the roof of the mine where the miner worked, was negligence for which the mine operator was liable.

Deep Vein Coal Co. v. Ward, — Ind. App. —, 123 Northeastern 228, p. 230.

ORDERS OF EMPLOYER—PLEADING.

The Employers' Liability Act of Indiana (act 1911, p. 145) makes no distinction between general and special orders; and in an action by a miner for injuries, it is not necessary for the complaint to aver or in any manner show whether the order alleged was general or special. It is sufficient to aver that the plaintiff was performing his duties under the order or by the instructions of the mine operator.

Fauvre Coal Co. v. Kushner, — Ind. —, 123 Northeastern 409, p. 412.
See *Vivian Collieries Co. v. Cahall*, 184 Ind. 473, 110 Northeastern 672.

DAMAGES—RECOVERY—RULE IN TORT ACTIONS.

The Employers' Liability Act of Arizona is not invalid because the recovery of damages in actions for injuries or death are governed by the rules governing actions of tort and may include disfigurement and bodily or mental pain. Whether these latter elements do or do not constitute an economic loss in the sense of diminished power to produce they are as much part of the workman's loss as the loss of a limb. It is true that pain can not be shifted to another. Neither can the loss of a leg. But one can be paid for as well as the other.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 559.

ACTION FOR BENEFICIARIES—RIGHT OF ADMINISTRATOR TO SUE.

The Arizona Employers' Liability Act (Civil Code 1913, paragraph 3158) provides that in case of death of an employee the em-

ployer shall be liable to the personal representative of the deceased for the benefit of the widow or husband and children of such employee; and if none, then to such employee's parents. Under this provision an administrator of a deceased employee can not maintain an action in his own name for the use and benefit of the parents of the deceased employee on the theory that he is a trustee of an express trust within the provisions of the Arizona Code. In such case suit must be brought in the name of the parents as the real parties in interest.

Bryan v. Inspiration Consol. Copper Co., — Ariz. —, 181 Pacific 577.

INDUSTRIAL COMMISSIONS.

JURISDICTION OF INDUSTRIAL BOARD.

There is no presumption of jurisdiction in favor of the Industrial Board under the Workmen's Compensation Act of Illinois.

Tazewell Coal Co. v. Industrial Commission, — Ill. —, 123 Northeastern 28, p. 29.

INDUSTRIAL ACCIDENT BOARD—JUDICIAL POWERS.

Many of the functions of the Industrial Accident Board created by the Montana Workmen's Compensation Act are judicial in character; but the Board is not vested with judicial powers in the sense in which that expression is used in the constitution. The Board does not possess power to decide and pronounce a judgment and carry it into effect between the parties. The Board was created as a purely administrative body and it may hear evidence to enable it to make an award in a particular case and to that end may call and hear witnesses; but it is without power to render enforceable judgments and its determinations and awards are not enforceable by execution or by other process until a judgment has been entered thereon in an application to a regularly constituted court. The Industrial Accident Board is a ministerial and administrative body with incidental quasi judicial powers.

Shea v. North-Butte Min. Co., — Mont. —, 179 Pacific 499, p. 503.

WORKMEN'S COMPENSATION ACTS.

OBJECT OF WORKMEN'S COMPENSATION LAWS.

The object of workmen's compensation laws is to substitute for the imperfect and economic wasteful common-law system by private action by an injured employee for damages for negligence on the part of the employer, a system by which every employee in a hazardous industry might receive compensation for any injury suffered

by him arising out of and in the course of the employment. Under the common-law action the injured employee could only recover by proof of negligence on the part of the employer and by proof of freedom from contributory negligence on his own part. Under workmen's compensation laws it is not necessary to prove either negligence on the part of the employer or freedom from negligence on the part of an injured employee. The theory of such legislation is that loss occasioned by reason of injury to employees shall not be borne by the employees alone, as under the common-law system, but directly by the industry itself and indirectly by the public. This class of legislation has been formulated after the most patient study and investigation by the most eminent men in professional and industrial walks of life in order to avoid any obstructions or limitations as might be encountered under the written Constitution, and such laws now in force in a great number of the States have in almost every instance been held constitutional.

Shea v. North-Butte Min. Co. — Mont. —, 179 Pacific 499, p. 501.

LIBERAL CONSTRUCTION.

Workmen's Compensation Acts should be liberally construed in order that the humane purposes of their enactment may be realized; and such a construction is to be adopted in determining whether an accident that produced injury arose out of and in due course of the employment.

Granite, Sand & Gravel Co. v. Willoughby, — Ind. App. —, 123 Northeastern 194, p. 195.

ARIZONA LAW—VALIDITY—INSTRUCTION—COMPENSATORY DAMAGES.

The Arizona Workmen's Compulsory Compensation Law together with the Employers' Liability Act limits the recovery for an injury to an employee strictly to compensatory damages. The former act makes no discrimination between employer and employee except such as necessarily arise from their different relation to the common undertaking. Both are essential to it, the one to furnish capital, organization and guidance, the other to perform the manual work; both foresee that the occupation is of such a nature and its condition such that sooner or later some of the workmen will be physically injured or maimed, or one killed occasionally, without particular fault of any one party. The statute requires compensation to be paid to the injured workman or his dependents because it is upon them that the first brunt of the loss falls, and it is to be paid by the employer because he takes the gross receipts of the common enterprise and by reason of his position of control can make such adjust-

ment as ought to be and practically can be made in the way of reducing wages and increasing the selling price of the product in order to allow for the statutory liability. In this respect there is no denial of equal protection of the laws.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 557.

CONSTITUTIONALITY OF MONTANA STATUTE.

The constitution of Montana provides in effect that there shall be a judicial remedy for every injury or wrong suffered by one person at the hands of another. This provision means that the courts must be accessible to all persons alike without discrimination and afford a speedy remedy for every injury or wrong recognized by law as being remedial in the court. The term "injury" as used in the constitution means such an injury as the law recognizes or declares to be actionable. This provision is not so binding as to strip the legislature of all power to alter or repeal any portion of the common law relating to accidental injuries or the death of one person by the negligence of another. The legislature can destroy vested rights, and where an injury has already occurred for which the injured person has a right of action, the legislature can not deny him a remedy. But remedies recognized by the common law in this class of cases together with all rights of action to arise in the future may be altered or abolished to the extent of destroying actions for injuries or death arising from negligent accident, so long as there is no impairment of rights already accrued. This conclusion necessarily follows from the established doctrine that no one has a vested right in any rule of the common law. It follows from these principles that the legislature may abolish technical rights of actions arising out of the negligence of an employer. On this theory the Montana statute does not violate the provisions of the State constitution.

Shea v. North-Butte Min. Co., — Mont. —, 179 Pacific 499, p. 502.

CONSTITUTIONALITY—EQUAL PROTECTION OF LAW.

The Workmen's Compensation Act of Montana is not unconstitutional on the ground that it violates the clause of the fourteenth amendment to the Constitution of the United States guarantying to the citizens the equal protection of the laws.

Shea v. North-Butte Min. Co., — Mont. —, 179 Pacific 499, p. 505.

CONSTITUTIONALITY—DUTIES IMPOSED ON STATE AUDITOR.

The Workmen's Compensation Act of Montana is not unconstitutional because the auditor of State is made a member of the board

and is required to execute a bond to guaranty the faithful performance of his duties, on the ground that this constitutes him a public officer in a capacity other than as State auditor. The Constitution prohibits the imposition of duties upon the State auditor that appertain to the legislative or judicial departments of the Government. But this act imposes upon the auditor no duties that appertain to the legislative or judicial departments of the Government and so long as this limitation is not violated the legislature is at liberty to impose any governmental duty upon the officer.

Shea v. North-Butte Min. Co., — Mont. —, 179 Pacific 499, p. 504.

ARIZONA WORKMEN'S COMPENSATION ACT—PERSONAL INJURY—
SYSTEMS OF RECOVERY.

An employee injured in the course of his employment has open to him three avenues of redress: (1) The common law liability, relieved of the fellow-servant defense and in which contributory negligence and assumption of risk are questions for the jury; (2) the employers' liability law which applies to hazardous occupations where the injury or death is not caused by his own negligence; (3) the compulsory compensation law, applicable especially to dangerous occupations by which compensation is granted without fault upon the part of the employer. The fact that the compensation act limits the recovery is never resorted to unless the employee has been negligent and is thereby debarred of a remedy under the employers' liability act. But the State may abolish contributory negligence or assumption of risk as a defense and the election of remedies is an option frequently given to a person entitled to an action. The right of an election of remedies can not be said to deprive employers of property without due process of law or to deny them equal protection because it confers upon an employee a free choice among several remedies.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 559.

ALASKA WORKMEN'S COMPENSATION ACT—NAMES OF BENEFICIARIES FURNISHED EMPLOYMENT AGENT.

The Workmen's Compensation Act of Alaska requires an employee to furnish to the employer a written statement showing the names of persons entitled to the benefits in case of his death. The statute is sufficiently complied with in this respect where an employee at the time of his employment furnished an employment agent with the required statement, although such person was a common employment agent of the employer company and of other mining companies.

Alaska Treadwell Gold Min. Co. v. Cranis, 255 Federal 810, p. 812.

EMPLOYER'S FAILURE TO NOTIFY BENEFICIARIES OF EMPLOYEE'S DEATH—
TIME FOR FILING CLAIMS.

Section 9 of the Workmen's Compensation Act of Alaska (Session Laws 1915, p. 146), provides that the employee shall furnish the employer a written statement showing the names of the persons who would be entitled to benefits under the act in case of his death. On the death of an employee it is made the duty of the employer to notify each beneficiary named in the statement given of the fact of the employee's death. The failure of an employee to give the required statement does not forfeit the right of a beneficiary to the benefits under the statute but it relieves the employer of all obligation to give to any of the beneficiaries notice of the death of the employee. But if the proper statement was furnished and the employer, on the death of the employee, failed to notify the beneficiaries named within the time and manner prescribed, the beneficiaries who have not been so notified may file claims and prosecute actions for the recovery of the sum due them after the expiration of the statutory period in which they would otherwise have been required to present their claims.

Alaska Treadwell Gold Min. Co. v. Cramis, 255 Federal 810, p. 813

CONSTRUCTION OF PIPE LINE—COMPANY SUBJECT TO STATE LAWS.

A pipe line company transported natural gas for domestic and foreign consumption through the same line to certain points where part was intended for use within the State. The company was engaged in the excavation of a ditch preparatory to laying a gas pipe parallel to its existing line and to be connected therewith for the purpose of increasing its capacity. As to the excavation of such ditch the company was subject unconditionally to the provisions of the West Virginia workmen's compensation act (Laws 1915, Chap. 9), and was liable for injuries to an employee working in such ditch whose injury was caused by the negligence of a fellow servant.

Roberts v. United States Fuel Gas Co., — W. Va. —, 99 Southeastern 549, p. 551.

ELECTION BY EMPLOYEE—POWER TO REPUDIATE.

The Workmen's Compensation Law of Montana (chap. 96, Laws 1915) declares that when both the employer and employee have elected to be bound by the act, its provisions shall be exclusive and such election is a surrender by both of their rights to adopt any other method, form, or kind of compensation, or cause of action either at law or at equity. When an employee has elected to become sub-

ject to the provisions of the Workmen's Compensation Law, he can not thereafter repudiate such election and prosecute an action for damages.

Shea v. North-Butte Min. Co., — Mont. —, 179 Pacific 499, p. 502.

PRESUMPTION AS TO EMPLOYEE'S ELECTION.

The Workmen's Compensation Act of Montana is elective. It points out the particular method by which both employer and employee shall indicate their election. It also provides that where an employer has made his election as prescribed, the employee shall be presumed to have elected to be subject to it and under the plan stated by the employer, unless he shall affirmatively elect not to be so bound. The silence of the employee after the election by the employer establishes a presumption that he elects to be subject to the act. It is clearly within the province of the legislature to establish presumptions and rules relating to the burden of proof and a statute establishing a presumption of this character is valid so long as the presumption is not unreasonable and is not conclusive of the rights of the parties.

Shea v. North-Butte Min. Co., — Mont. —, 179 Pacific 499, p. 503.

EMPLOYEE MAY WAIVE BENEFITS.

An injured employee can not complain because of the difference in the modes by which the employer and the employee may indicate their election to be bound by the workmen's compensation act, as it is competent for an employee to waive the advantage of any provision of law which was intended solely for his benefit so long as such waiver does not violate public policy; and an employee may at his option waive in advance the advantage of any remedy established solely for his benefit which the legislature may itself abolish, especially when it has provided a substitute remedy which renders his right to relief absolute.

Shea v. North-Butte Min. Co., — Mont. —, 179 Pacific 499, p. 503.

COURSE OF EMPLOYMENT.

An injury occurs in the course of the employment when it is within the period of the employment at a place where the employee may reasonably be and while he is reasonably fulfilling the duties of his employment or is engaged in doing something incidental to it.

Granite, Sand & Gravel Co. v. Willoughby, — Ind. App. —, 123 Northeastern 194, p. 195.

COURSE OF EMPLOYMENT—EMPLOYEE MINISTERING TO HIS WANTS.

The rule is that acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and such acts of service are within the Workmen's Compensation Acts, although they only indirectly are conducive to the purposes of the employment. The rule was applied in a case where a watchman employed by a mining company was injured while blasting stumps upon the premises in order to procure fuel for the purpose of heating and cooking.

Ocean Accident & Guaranty Corp. v. Pallaro, — Colo. —, 180 Pacific 95, p. 96.

INJURIES ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

A watchman was required to reside on the mine premises and to remain thereon during all hours of the day. The company furnished him with a cabin equipped with bedding and a cooking stove but supplied no fuel. No fuel was obtainable nearer than 600 or 700 yards distant, and to secure which he would have to leave the premises. The mine premises were covered with solid pine stumps constituting good fuel. The watchman while blasting some of the stumps with dynamite for the purpose of securing fuel was struck upon the head by a piece of flying wood, the injury causing his death. The Workmen's Compensation Act of 1915 as amended by the act of 1917 provides that if at the time of the accident the employee is performing services arising out of and in course of his employment, he is entitled to compensation. At the time of the injury the watchman was procuring fuel to protect himself from cold and for cooking purposes, and this was incident to the employment. The act of procuring fuel was ultimately for the benefit of the employer and was, under the existing circumstances, "arising out of and in the course of the employment."

Ocean Accident & Guaranty Corp. v. Pallaro, — Colo. —, 180 Pacific 95, p. 96.

INJURY ARISING OUT OF EMPLOYMENT—ACCIDENT.

A workman was employed and engaged in breaking rock in a quarry with a 16-pound sledge hammer and then to load the rock into a car. The breaking of the rock was hard work, and in order to earn fair wages it was necessary for the workman to work hard. At the noon hour he ate his lunch, seemed to be feeling well, was cheerful and in good spirits, but in the afternoon while at his working place, he was observed to be bending over and streams

of blood were gushing from his mouth and nostrils and he died before medical aid could reach him. Shortly before the hemorrhage he was using the heavy sledge hammer on a large rock. These facts are sufficient to indicate an injury by "accident," an injury "arising out of the employment" within the meaning of the Workmen's Compensation Act of Kansas.

Gilliland v. Ash Grove Lime & Portland Cement Co., — Kan. —, 180 Pacific 793.

PRESENTATION OF CLAIM—PRECEDENT—TIME FOR MAKING—CONDITION.

Under the Workmen's Compensation Act of Kansas (General Stats. 1915, Sec. 5916), proceedings against a mine operator to recover compensation for an injury by a miner can not be maintained unless the claim for compensation was made within three months after the accident. A demand for compensation within three months is a condition precedent to a right of action under the statute.

Jacobs v. Hamilton Coal & Mercantile Co., — Kan. —, 182 Pacific 410, p. 411.

CLAIM FOR COMPENSATION—TIME FOR MAKING—FINDING CONCLUSIVE.

The Workmen's Compensation Act of Kansas (General Stats. 1915, sec. 5960), expressly provides that proceedings for the recovery of compensation shall not be maintainable unless a claim for compensation has been made within three months from the time of the accident. Where in an action by a miner for compensation for injuries under the statute the trial court finds as a fact that a claim for compensation was not made within the statutory time the conclusion is binding upon the court on appeal.

Jacobs v. Hamilton Coal & Mercantile Co., — Kan. —, 182 Pacific 410, p. 411.

NOTICE OF CLAIM—CONSTRUCTION.

The Alaska Workmen's Compensation Act (Session Laws 1915, p. 146), requires that the beneficiary or some one in his behalf shall within 120 days from the death of the employee serve a written notice upon the employer that shall contain the name and address of the beneficiary, the relation existing between beneficiary and deceased, and some other matters. It is provided that the notice shall be liberally construed and no claim for compensation denied because of any defect in the notice, if the notice was served with a bona fide intention to comply with the statute. The failure to serve such notice is an affirmative defense in an action by a beneficiary and the

beneficiary is not required to justify a recovery to prove that the notice was served.

Alaska Treadwell Gold Min. Co. v. Cranis, 255 Federal 810, p. 811.

INJURED MINER—LUMP SUM ALLOWANCE—RECORD—REVIEW.

The Workmen's Compensation Act of Illinois (Hurd's Rev. Stats. 1917, Chap. 48), provides that when it appears for the best interests of the parties compensation to an injured miner may be paid in a lump sum. The record in such case must show what notice of the proceedings was given the coal-mine operator and must contain the testimony upon which the decision was based in order that the court on review may determine whether there was any evidence fairly tending to sustain the order. A record containing only the conclusion of the industrial Board is not sufficient.

Tazewell Coal Co. v. Industrial Commission, — Ill. —, 123 Northeastern 28, p. 29.

INJURY TO LEG—COMPENSATION.

Under the Workmen's Compensation Act of Kansas (Laws 1917, Chap. 226) an injury to a miner's leg may in some instances justify a larger amount of compensation than the loss of the leg, and in such case a court may follow paragraph 19 of section 3 instead of the schedule set forth in paragraph 14.

Close v. Lucky OK Min. Co. — Kan. —, 182 Pacific 392, p. 393.

INDUSTRIAL ACCIDENT COMMISSION—AWARD PROCURED BY FRAUD—REMEDY.

A stockholder in a mining corporation purchased a large amount of stock from the widow of a miner who was killed while working in the mine. A part of the consideration for the purchase was an agreement by the widow not to present any claim for damages nor seek to obtain any award as compensation for the death of her husband to be paid by the mining company. After the transfer of the stock the widow filed a claim with and procured an award from the Industrial Accident Commission. The Industrial Accident Commission is a court of limited jurisdiction and is wholly without power or authority in matters of general jurisdiction without the scope of the Workmen's Compensation Act. The petitioner not having been a party to the proceedings before the commission and not having questioned the validity of the award prior to its final adjudication and its affirmance by the court, was wholly without the juris-

diction to hear or determine the matter and could not order a stay of execution on the judgment entered on its award.

Gamble v. Superior Court of Alameda County, — Cal. App. —, 179 Pacific 717, p. 718.

AWARD PROCURED BY FRAUD—JURISDICTION OF COURT—INJUNCTION.

The superintendent of a mining company was killed while working in the mine. At the time of his death he owned 12,000 shares of stock of the mining company which subsequently passed to his widow. Another stockholder of the company agreed to purchase the stock for the sum of \$7,200 in consideration that the widow would bring no suit and file no claim with the Industrial Accident Commission for an award of damages on account of the death of her husband. After the purchase of the stock was consummated, the widow in violation of the agreement and without the knowledge of the purchaser of the stock filed a claim and obtained an award of \$5,000 against the company for the death of her husband. Under these facts the superior court of the county and the judge thereof had jurisdiction to hear an action in form and in the nature of an equitable proceeding to enjoin the widow from proceeding to collect by execution or other process, and the provision of the Workmen's Compensation Act that denies jurisdiction of courts of the State to review, reverse, correct, or annul any order, decision, or award of the commission does not prevent the Superior Court as a court of equity from entertaining jurisdiction and granting such relief as the party may be entitled to.

Gamble v. Superior Court of Alameda County, — Cal. App. —, 179 Pacific 717, p. 719.

DEFENSES ABROGATED.

The technical defense of contributory negligence and assumption of risk may be abolished or modified by a workmen's compensation act without transcending any constitutional guaranty.

Shea v. North-Butte Min. Co., — Mont. —, 179 Pacific 499, p. 503.

By the workmen's compensation act of West Virginia a mining corporation that is in fault is liable for the negligence of his servants or agents and is denied the defense of assumption of risk.

Roberts v. United Fuel Gas Co., — W. Va. —, 99 Southeastern 549, p. 552.

By the workmen's compensation act of West Virginia a mining corporation that is in fault is liable for the negligence of its servants or agents and is denied the defense of contributory negligence.

Roberts v. United Fuel Gas Co., — W. Va. —, 99 Southeastern 549, p. 552.

Under the workmen's compensation act of West Virginia a mining corporation is liable for an injury to an employee caused by the negligence of a fellow employee and he is deprived of the fellow servant defense by the express provisions of the statute.

Roberts v. United Fuel Gas Co., — W. Va. —, 99 Southeastern 549, p. 552.

CONTRIBUTORY NEGLIGENCE OF EMPLOYEE.

Section 8 of the Colorado Workmen's Compensation Law of 1915 enumerates the conditions which must occur and exist in order to give a right to compensation and freedom from negligence on the part of an employee is not included and therefore negligence is no defense to a claim for compensation. Neither does negligence alone prevent any act ordinarily incident to the employment from being one performed out of and in the course of the employment. A peril that arises from the negligent or reckless manner in which an employee does his work may well be held to be a risk incidental to the employment.

Ocean Accident & Guaranty Corp. v. Pallaro, — Colo. —, 180 Pacific 95 p. 97.

VIOLATION OF RULE—CONTRIBUTORY NEGLIGENCE.

Where the miner's injuries were caused by his violation of a rule promulgated by the mine operator, he was guilty of contributory negligence; but under the workmen's compensation act of Kentucky, the defense of contributory negligence is abolished where the mine operator has not elected to operate under the workmen's compensation act.

West Kentucky Coal Co. v. Smithers, — Ky. —, 211 Southwestern 580, p. 581.

MINES AND MINING OPERATIONS.

ACTIONS—PLEADING AND PROOF OF NEGLIGENCE.

RECOVERY MUST FOLLOW ALLEGATIONS OF NEGLIGENCE.

In an action by a miner for damages for injuries caused by falling into an ore chute, the allegation of negligence was that the mine operator failed to warn or apprise the plaintiff of the existence of the ore chute into which he fell. The plaintiff was an experienced miner and timberman and at the time of the injury was passing through the mine for the purpose of ascertaining where timbering might be required. He knew of the method of carrying on the mining operations and that there were a large number of ore chutes in the stopes of the mine for the purpose of disposing of the ores and waste material. The law did not impose upon the mine operator the duty to warn or notify the plaintiff respecting the existence of the chute in question, unless the operator thought the plaintiff had no knowledge and did not have the means of knowing that the ore chute was maintained in the condition it was. Under the evidence there could be no recovery for the particular negligence averred, the failure to warn or apprise the plaintiff of the existence of the ore chute.

Macky v. Bingham, New Haven Copper & Gold Min. Co., — Utah —, 180 Pacific 416, p. 417.

RELATION OF MASTER AND SERVANT.

ADMISSIBILITY OF PAY ROLL TO PROVE RELATION.

In an action to recover damages for the death of a miner employed in a mine on the issue as to whether the deceased was an employee of the mine operator, a pay roll containing the name of the deceased but which he never signed and which he never saw was not admissible in evidence.

Alaska Treadwell Gold Min. Co. v. Cranis, 255 Federal 810, p. 812.

EMPLOYMENT BY COMMON EMPLOYMENT AGENT.

A mining company as one of several companies having a common employment agent can not defeat a claim for benefits under the

Alaska Workmen's Compensation Act on the ground that the deceased was not in its employ at the time of his death, where the common employment agent assigned the men employed by him to the different mining companies and failed to make it plain to the deceased employee for which company the agent was acting and for which the employee was to work.

Alaska Treadwell Gold Min. Co. v. Cranis, 255 Federal 810, p. 812.

OVERSIGHT RETAINED BY OPERATOR.

The relation of master and servant was fully shown by proof that an employee to whom superintendence was entrusted employed and discharged the miners but that the superintendent and the miners were all under the direction and subject to the orders of the bank boss and that the superintendent and the men under him not only represented the mine operator in the ultimate result of the work but in all the details.

Alabama Fuel & Iron Co. v. Smith, — Ala. —, 82 Southern 30, p. 31.

DEVIATION FROM EMPLOYMENT—EFFECT ON RELATION.

Where a servant or an employee so far deviates and disobeys the instructions of the master or employer as to amount to an entire abandonment of the master's service, then the master is not liable for an injury inflicted through the negligence of his servant; but if the deviation is a mere incident to the discharge of a duty which the servant is performing at the time such departure occurs and after the termination of which authorized service is resumed then the master is liable.

Pierce-Fordyce Oil Association v. Brading, — Tex. Civ. App. —, 212 Southwestern 707, p. 709.

BURDEN OF PROOF.

A miner suing for damages for injuries received while working in a mine alleged in his complaint that he was employed by the "defendants." Under the allegation that he was the employee of all the defendants, the burden was upon him to so prove. In actions for tort where two or more persons are jointly sued as defendants a recovery may be had against all or against one or more, according to the proof; but the rule does not apply where the action is for a negligent performance or for a negligent failure to perform a duty arising out of a contract whereby injury and damage resulted. In such a case the averment of the contract from which the alleged duty to

the plaintiff arose is a material allegation and must be proved as charged.

Coal City Min. Corp. v. Davis. — Ala. App. —, 81 Southern 358, p. 359.

LEASE OF MINE WITHOUT CHANGE OF POSSESSION.

A mining company owning a mine with all the equipment for carrying on mining operations leased the mine and equipment to a third person without apparent change of possession, the mining company continuing to pay the employees, without notice of any change in the possession. Under these circumstances, in an action by a miner for damages for injuries, it was a question of fact for the jury to determine who was the employer of the miner at the time of the injury.

Coal City Min. Corp. v. Davis. — Ala. App. —, 81 Southern 358, p. 359.
See Amerson v. Corona Coal & Iron Co., 194 Ala. 175, 69 Southern 601.

Sloss-Sheffield Steel & Iron Co. v. Hubbard. 14 Ala. App. 139. 68 Southern 571.

Corona Coal & Iron Co. v. Amerson. — Ala. —, 75 Southern 289.

NEGLIGENCE OF OPERATOR.

QUESTION OF FACT.

Where reasonable men might honestly differ in their conclusions, and where the facts set out in a complaint for damages for injuries to a miner are of a character to be reasonably subject to more than one inference or conclusion as to whether negligence on the part of the operator existed, the question is then one of fact for a jury to determine.

Fauvre Coal Co. v. Kushner. — Ind. —, 123 Northeastern 409, p. 413.

PROOF SUFFICIENT—VIOLATION OF DUTY.

To establish negligence on the part of a mine operator it is not sufficient for an injured miner to show that there was a violation of duty owing to another person or class of persons which, had it been performed, would have prevented the injury complained of; but it must further appear that there was a violation of a duty owing to the injured person, or to a class to which he bore the necessary relation to make the duty applicable to him.

West Kentucky Coal Co. v. Smithers. — Ky. —, 211 Southwestern 580, p. 581.

See Kamonvi v. Consolidated Coal Co., 182 Ky. 683, 206 Southwestern 883.

VIOLATION OF DUTY—PROBABLE RESULTS.

When an employer has violated a duty his liability extends to such injuries as might reasonably be anticipated, under ordinary circumstances, as the natural and probable result of his wrongful act.

Texas & Pacific Coal Co. v. Ervin, — Tex. Civ. App. —, 212 Southwestern 234, p. 235.

INJURIES REASONABLY ANTICIPATED.

A mine operator guilty of negligence is responsible for all consequences which prudent and experienced men fully acquainted with all the circumstances, which in fact exist, whether they could have been ascertained by reasonable diligence or not, would at the time of the negligent act have thought reasonably possible to follow if they had occurred to their mind.

Woodward Iron Co. v. Gamble, — Ala. —, 81 Southern 810.

FAILURE TO INSPECT AFTER BLAST—QUESTION OF FACT.

A mine operator has not discharged his duty to a mucker where an inspection of the particular raise where the mucker was required to work was made at 6 o'clock, and that afterwards and before the mucker was ordered to the raise to work a blast was fired in the raise and no inspection was made after this blast was fired. Under this evidence the question of the negligence of the operator was one of fact for the jury.

Wooton v. Dragon Consol. Min. Co. — Utah —, 181 Pacific 593, p. 594.

INTERVENING AGENCY.

The connection between any negligence charged on the part of a mine operator and an injury complained of by a miner may be broken by an intervening cause or agency, and such connection is to be considered as broken if the intervening event is one which in the natural and ordinary course of things may not reasonably be anticipated.

Woodward Iron Co. v. Gamble, — Ala. —, 81 Southern 810, p. 811.

APPLIANCES MAINTAINED BY OPERATOR—PROOF AND PRESUMPTION.

Where an accident resulting in an injury is such as in the ordinary use of appliances does not happen if those who have the management of such appliances use proper care, then proof of the accident and injury affords reasonable evidence, in the absence of explanation by the mine operator, that the accident arose from a want of care. An

injured employee under such circumstances need not do anything further than to show that the defect was known to the operator, or that it would have been discovered upon the exercise of reasonable care to ascertain its condition.

Duran v. Yellow Aster Min. & Mill. Co., — Cal. App. —, 181 Pacific 395, p. 396.

UNSAFE APPLIANCE—OPERATOR'S KNOWLEDGE—LIABILITY.

A driver of a mine car was injured while using a jack to raise his car to replace it on the tracks. After the jack was set it failed to hold, and the lever flew back, striking and injuring the driver. Proof that another miner had been injured while using the jack and proof that a jack used by another miner had slipped a number of times was not sufficient to show knowledge on the part of the mine operator of the defective condition of the jack, where the evidence did not disclose that the first miner was injured through some fault of his own and not that the jack was defective and where there was nothing to show that the jack that slipped many times when used by another miner was the same that caused the injury.

Howell v. Stearns Coal & Lumber Co., — Ky. —, 212 Southwestern 463.

KNOWLEDGE OF UNSAFE CONDITION—ROOF OF MINE.

A room in a mine had remained unworked for a period of one year. The exposure to the air necessarily weakened the roof. The operator intending further operations in the room had it examined by the foreman and additional props placed by timbermen employed for that purpose. While engaged in this work the timbermen discovered several cracks in the roof and discussed the advisability of using a "header" or "cross bar" to support a portion of the roof and the plan would have been adopted had the necessary timber been at hand. A header consists of timber from four to six inches square and ten to twelve feet long, placed across the weak portion of a roof supported by upright posts at the ends, leaving space between for operating a cutting machine. The situation called for the roof being supported by headers, and it was negligence on the part of the operator to order a machine operator to work under the dangerous roof.

Consolidated Coal Co. v. Marcum, 257 Federal 287, p. 289.

FAILURE TO MAKE BREAKTHROUGHS—LIABILITY.

A mine operator can not be held liable on the ground of negligence in an action by a shot firer for damages for injuries for failure to

make breakthroughs at shorter intervals than 40 feet, the distance that was suggested by the shot firer himself at the time the breakthroughs were located.

Parocca v. Missouri, K. & T. R. Co., — Kan. —, 180 Pacific 270.

CONSTRUCTION OF BATHHOUSE—INSUFFICIENT PROOF.

A mine operator, pursuant to the statute of Oklahoma, constructed a building for a shower bath and maintained the same according to the statutory requirements. The floor of the room was made of concrete and in the center there was a basin some 6 feet square gradually sloping toward the center and about 6 inches lower in the center than at the outer edge. The pipe for letting on the shower was immediately over the center of the basin and the basin was drained with a pipe from that point. A miner while taking a bath slipped and fell upon the concrete floor, breaking his arm and sustaining permanent injuries for which he sued. In such a case the question of actionable negligence rests upon the margin of difference between a basin of just slope enough to make it sanitary by draining off the water and soap and a slope which this one had. There was no proof that the construction of the basin was essentially different from the ordinary manner of constructing such basins nor was there proof that it was any steeper than required by the statute to make it sanitary. In the absence of proof of any violation of the statute and of any actionable negligence the mine operator was not liable in damages to the injured miner.

Rock Island Coal Min. Co. v. Taylor, — Okla. —, 182 Pacific 81, p. 82.

GAS COMPANY MAINTAINING BROKEN PIPE.

A gas company may be charged with actionable negligence in turning gas into a service pipe although the service pipe had been severed or disconnected without its knowledge leaving an open end under the complainant's house, but where its agent informed the gas company that gas was not going through the pipe and entering the meter for which it was intended. In such case it was the duty of the company to turn off the gas until by examination it could ascertain that the gas was flowing properly through the pipe.

Hahn v. Southwestern Gas Co., 145 La. —, 82 Southern 199, p. 200.

MINERS RIDING ON LOADED CARS—DUTY OWING—PROOF OF CUSTOM.

A track layer in a mine was riding out of the mine on a loaded coal car drawn by a mule. While en route a string of empty cars that had been placed on a lieaway ran down grade, because the brakes were not sufficient to hold them, and collided with the car on which

the track layer was riding and by reason of which he was injured. The coal mine operator in not applying the brakes to the empty cars so as to prevent them from running down grade was guilty of negligence as to the drivers of loaded cars or other persons having a right to be on the loaded cars; but he was not guilty of negligence as to the track layer unless he had a right to be on the loaded car at the time of the injury and unless the mine operator was charged with the duty of anticipating his presence on the loaded car. If it was customary for miners not connected with the operation of cars to ride on loaded cars with the knowledge of those in charge of the mine in going in and out of or about the mine, then the operator owed the track layer the duty of protecting him while so riding on a car. In the absence of proof of any such custom a court could not assume as a matter of law that the operator owed a duty to the track layer while riding on a loaded car; but it was a question of fact as to whether or not such a custom existed and to be determined by the jury under the evidence in the case.

West Kentucky Coal Co. v. Smithers, — Ky. —, 211 Southwestern 580, p. 581.

INSUFFICIENT PROPPING.

A mine owner may be charged with actionable negligence where the roof of the mine was so loosely propped that a chance blow, such as a mule running against a prop could knock it down, and that such a mischance might reasonably be expected to happen in the ordinary course of mining operations and in such case a jury might find that such negligence was the proximate cause of an injury to the driver of the mule and that the injury was immediately produced by the accidental contact of the mule with the prop.

Brilliant Coal Co. v. Barton, — Ala. —, 81 Southern 828, p. 830.

INSTRUCTION—TIMBER "TOO NEAR THE RAIL."

In an action by a miner for damages for injuries caused by being caught between a supporting timber and a mine car, the court instructed the jury that the question as to negligence would be whether or not the timber or post was in fact "too near the rail." This statement informed the jury that if the post or timber in question was "too near" the track its maintenance in that position was negligence as a matter of law. This instruction withdrew from the jury the question of the feasibility of any other mode of supporting the roof at that point, and also the question of the miner's injury being a natural and probable result to be anticipated from such location.

These questions rested upon inferences from the evidence to be drawn only by the jury.

Birmingham Fuel Co. v. Taylor, — Ala. —, 81 Southern 630, p. 631.

DUTY OF OPERATOR TO FURNISH SAFE PLACE.

NONDELEGABLE DUTY.

A primary and nondelegable duty rests upon a coal mine operator to exercise reasonable care in furnishing a miner with a reasonably safe place to work.

Consolidated Coal Co. v. Marcum, 257 Federal 287, p. 288.

See Dasher v. Hocking Min. Co., 212 Federal 628.

INSPECTION—SUFFICIENCY AND PRESUMPTION.

In an action for damages for injuries to a miner by the fall of a rock the evidence showed that before the accident a miner went into the raise to inspect and that he came down again after he had been on the raise 20 or 30 minutes; but there was no direct evidence of any particular kind of an inspection. Under this evidence the court can not presume or hold that there had been a proper inspection or that any particular inspection had been made, and that the mine operator had therefore performed his duty.

Wootton v. Dragon Consol. Min. Co., — Utah —, 181 Pacific 593, p. 594.

BREACH OF DUTY—PLEADING.

A complaint by a miner for damages for injuries is sufficient where it shows a legal duty owing by the mine operator to use care to make the working place of the miner safe for the kind of work he was doing, avers a breach of that duty by the mine operator and an injury to a miner. The complaint need not specifically allege that a duty was owing on the part of the mine operator to the miner as the existence of a duty depends upon the facts pleaded, and the law would imply its existence where the facts stated warrant such inference.

Fauvre Coal Co. v. Kushner, — Ind. —, 123 Northeastern 409, p. 413.

See Rock Oil Co. v. Brumbaugh, 59 Ind. App. 640, 108 Northeastern 260.

REMOTE CONTINGENCY.

A safe working place is not necessarily inferred from the fact that no employee had ever before throughout many years of operation been injured by contact with a post in a mine near a car track, and does not as a matter of law disprove negligence in failing to furnish a safe place. That which never happened before and which

in its character is such as not naturally to occur to prudent men to guard against its happening at all, can not when in the course of years it does happen furnish good grounds for the charge of negligence in not foreseeing its possible happening and guarding against the remote contingency.

Birmingham Fuel Co. v. Taylor, — Ala. —, 81 Southern 630, p. 631.

DUTY TO PROVIDE SAFE APPLIANCES.

FAILURE TO SUPPLY—KNOWLEDGE OF DEFECTS—FAILURE TO INSPECT.

In an action by a miner for damages for an injury resulting from the breaking of a rope used to sustain and hold the weight of a dump car, proof that immediately before the accident an engine had run over the rope and that no inspection was then made to determine the sufficiency and safety of the rope before it was used to haul the dump car was sufficient to justify the jury in finding that the breaking of the rope was due to its being run over by the engine.

Duran v. Yellow Aster Min. & Mill. Co., — Cal. App. —, 181 Pacific 395, p. 396.

DEFECTIVE APPLIANCE—BURDEN OF PROOF.

A driver whose car had jumped the track was using a jack supplied by the mine operator to raise the car to get it back on the track. While so engaged the lever of the jack flew back, striking him in the eye and producing the injuries complained of. The burden was on the miner, to entitle him to recover, to show not only that the jack was defective but that the defect was known to the mine operator or could have been known to him by the exercise of ordinary care. The slipping of the jack that caused the lever to fly back was some evidence of its defective condition, but there was nothing to show the character of the defect or how long it had existed. Proof that the foreman knew that another miner had his fingers cut off by the jack did not show any knowledge of any defect in the jack, as that accident may have been due entirely to the negligent operation of the jack.

Howell v. Stearns Coal & Lumber Co., — Ky. —, 212 Southwestern 463.

EXERCISE OF CARE—EMPLOYER NOT INSURER.

It is the duty of a mine operator to exercise ordinary care to furnish a reasonably safe pipe wrench for use for his employees. But this is not, as a matter of law, an absolute duty; and it is error for a court to charge a jury to the effect that it is the duty of an employer to furnish reasonably safe machinery and tools with which

his employees work and that a failure to do so is negligence on the part of the employer.

Texas & Pacific Coal Co. v. Ervin, — Tex. Civ. App. —, 212 Southwestern 234, p. 235.

DUTY TO WARN OR INSTRUCT.

LIABILITY FOR FAILURE TO WARN.

An experienced miner was employed as a timberman in a mine. In the performance of his duties he was required to go through the mine from time to time and ascertain where timbering might be required. The mine operator maintained a large number of ore chutes, through which ore and refuse were carried down to a lower level. The miner knew of the existence of these chutes. Under these circumstances the law did not impose upon the mine operator the duty of warning or instructing the miner as to the particular location of the different chutes. The ore chutes did not constitute a latent defect nor were they a concealed danger in the sense that the miner should be warned, nor was the condition of the chute suddenly changed so as to endanger the safety of the plaintiff. The chutes were common and constituted a part of the method by which the operator conducted the mining operations. In passing through the mine in the performance of his duties the miner had at least as good an opportunity to learn the location and condition of the ore chutes as anyone and his knowledge in that regard was equal to the operator's.

Mackey v. Bingham, New Haven Copper & Gold Min. Co., — Utah —, 180 Pacific 416, p. 417.

INEXPERIENCED MINER—INSUFFICIENT WARNING.

An inexperienced miner was employed to shovel ore into a chute upon an upper level of a mine. The chute was emptied by a door at the bottom by means of which the ore was loaded into cars. When the chute was filled with ore, there was some danger to the miner shoveling the ore if the door was opened and the ore began to run out and settle down at the top; but it was particularly dangerous to the ore shoveler when from any cause the ore became congested, as it frequently did, and stuck in some part of the chute above the door and from any cause suddenly became released and would thereby draw the ore down from above. The miner at the time he was set to work was warned of the general danger of the ore settling when the door below was open for the ore to run out; but he was given no warning of the greater danger in case the ore became congested and was suddenly loosed and fell below into the empty part of the chute. While the miner was working shoveling ore into or over the chute, the ore became congested at some point

in the chute and afterwards suddenly gave way and the rapidly sinking ore drew the miner into the chute causing his death. The warning given as to the particular danger that did in fact cause the miner's death was entirely insufficient considering the experience of the miner and the particular danger the mine operator knew that the miner might encounter.

Ozark Min. Co. v. Silva, 255 Federal 821, p. 823.

HAZARDOUS UNDERTAKING—EMPLOYER'S KNOWLEDGE OF DANGER.

It is the duty of a mine operator to notify a miner of dangers that are latent and known to the mine operator but unknown and unappreciated by the miner and are not readily observable by him, so that one of his age, experience, and intelligence would know and appreciate the danger and would know how to avoid the dangers.

Ozark Min. Co. v. Silva, 255 Federal 821, p. 824.

DUTY TO PROMULGATE RULES.

CONSTRUCTION AND APPLICATION OF RULE.

A coal mine operator had a rule that no employees should ride on a motor or trip of loaded cars except those operating the motor or trip and made it the duty of the motormen not to allow any one to ride on the motor or cars except by permission of the foreman. The construction of such a rule is for the court and it should be construed so as to carry out the purpose of its adoption but its scope should not be extended to include cases not embraced in the language employed. The company evidently regarded the riding on the motor or on cars drawn by the motor as especially dangerous and the rule was adopted to meet that condition. The rule especially emphasizes the words "motor," "trip," "locomotive," "trip of loaded cars," "motor trip" and "motorman." The rule therefore applies only to motors or cars drawn by motors and does not apply to a single car drawn by a mule and a miner riding on a car drawn by a mule at the time of his injury was not violating the rule in question.

West Kentucky Coal Co. v. Smithers. — Ky. —, 211 Southwestern 580, p. 581.

RULES ABROGATED OR WAIVED.

A coal mine operator had a rule requiring machine runners and helpers to carefully sound the roof of their working place before beginning work and if weaknesses were discovered extra props

must be set. A machine operator did not know of this rule, but he did examine a room in substantial compliance with the rule before beginning work but found no evidence of weakness. The mine operator had not in fact enforced or relied but rather had waived the rule by keeping employed a force of men to perform the particular work required by the rule.

Consolidated Coal Co. v. Marcum, 257 Federal 287, p. 289.

See Eagle Coal Co. v. Patrick, 161 Ky. 333. 170 Southwestern 960.

CUSTOMARY VIOLATION—EFFECT.

Custom and usage may be relied upon to excuse the violation of a rule where the act involved is not negligent itself but only by relation to the rule violated. When the act may be done in two or more ways and resort to neither of which involves obvious peril which raises the legal presumption or conclusion of negligence in the doing of it, a custom or usage to do it in a particular way may be looked to as tending to show that it was not negligence to resort to that method in the particular instance. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril which is voluntarily and unnecessarily done and which the law itself declares to be negligent.

Brilliant Coal Co. v. Barton, — Ala. —, 81 Southern 828, p. 830.

DUTY TO FURNISH FIRST AID.

DUTY AND CARE REQUIRED.

It is the duty of a mine operator or other employer where an employee is injured to exercise ordinary care to secure and provide first aid for the injured employee and in the exercise of such care to secure for the injured employee surgical and medical treatment at the hands of competent physicians and surgeons.

Hunick v. Meramec Quarry Co., — Mo. —, 212 Southwestern 345.

MINER'S WORKING PLACE—SAFE PLACE.

MAIN ENTRY—RELATIVE DUTY OF MINER AND OPERATOR—QUESTION OF FACT.

Under the law of Missouri it is the duty of a miner to keep his working place safe, and it is the duty of the mine operator to keep the entries, the places generally used by many miners, in a condition of reasonable safety. A miner was injured in a main entry in which at the time he was preparing a room neck. The proof showed that the mine operator had what was called "day men" whose duty it

was to go through the entries and see that they were safe and the operator's servants had known for some time before the accident causing the injury complained of that the rock that fell was loose. The proof also showed that it was the company's duty to take care of the loose rock according to the custom of the mine and that the miner who was injured had no right to take the rock down. Under this proof it was a question of fact for the jury to determine whether it was the duty of the miner or the duty of the mine operator to keep the particular place safe.

Teter v. Central Coal & Coke Co., — Mo. App. —, 213 Southwestern 135, p. 136.

See *State v. Ellison*, 270 Mo. 645, 195 Southwestern 722.

INSTRUCTION AS TO DUTY OF MINER.

In an action by a miner for damages for injuries caused by a fall of rock from the roof of an entry and under which the miner was at the time engaged in starting a room neck the court could not as a matter of law instruct the jury that the miner was required to use ordinary care in inspecting the roof above him "if he had to use a small portion or section of the main entry," where the evidence was conflicting as to whether it was the duty of the miner or of the mine operator to inspect and keep safe the roof of the entry.

Teter v. Central Coal & Coke Co., — Mo. App. —, 213 Southwestern 135, p. 137.

OPERATOR'S ASSURANCE OF SAFETY—RELIANCE.

MINER'S KNOWLEDGE OF DANGER—RELIANCE UPON ORDERS OF EMPLOYER.

A room in a mine was left standing and unused for about a year and the roof was during the time supported by numerous posts. This exposure naturally weakened the roof. The mine operator kept employees whose duty it was to put rooms of this kind in proper condition for the cutting of coal, and these employees did prepare this particular room for coal cutting and thereupon a miner and his assistant who were operating a coal cutting machine were directed to remove the machine to this particular room and to proceed with the cutting of coal. The operator of the machine was not satisfied that the room had been put in fit condition and upon complaint additional work was done in the room and thereupon the foreman told the machine operator that the room was "in condition to cut," "in good shape," and peremptorily ordered him to do the work or leave the employ of the company. The machine operator on further examination and some sounding of the roof, though not a careful ex-

amination was made, but relying on the assurance of the foreman, yielded to the peremptory order, took the machine into the room and began to cut coal, and within 30 minutes was injured by a fall from the roof. Under these circumstances the question of negligence on the part of the mine operator and of contributory negligence on the part of the machine operator were questions of fact to be determined by the jury.

Consolidated Coal Co. v. Marcum, 257 Federal 287, p. 288.

VICE PRINCIPALS.

VICE PRINCIPAL—NEGLIGENCE—LIABILITY OF MASTER.

A miner was directed by the shift boss to go on top of certain lagging above an ore chute and nail it down before the machine men blasted their holes. The machine men informed the miner that they were going to blast and directed him to come up; thereupon he asked them if everything was all right and was told by one of them that everything was all right and that he could proceed in safety. As the miner was going up on top of the chute he was hit on the head by a rock. It was the duty of the machine men to inform the miner of any apparent danger and not to induce him to believe that everything was safe. It was their duty to exercise ordinary care to prevent injury to the miner and if they failed in the discharge of that duty they were guilty of negligence, and as they represented the operator their knowledge was his and their negligence was his. It was therefore under the circumstances a question of fact whether there was negligence and whether it was the proximate cause of the injury to the miner or not.

Arrascada v. Silver King Coalition Mines Co., ——— *Utah* ———, 181 Pacific 159, p. 160.

SUPERINTENDENCE OF EMPLOYEE.

A mine operator is liable for injuries to a miner caused by the negligence of another employee who had superintendence intrusted to him where the injuries complained of were caused by an unexpected charge left by miners under the direction of the employee to whom superintendence had been intrusted.

Alabama Fuel & Iron Co. v. Smith, ——— *Ala.* ———, 82 Southern 30, p. 31.

KNOWLEDGE OF SUPERINTENDENT IMPUTED TO OPERATOR.

The actual knowledge of the superintendent of a mine that a certain part of the mine was gaseous is imputed to the operator and

renders him liable for the death of a miner caused by an explosion of gas produced by running an electric motor through such gaseous portion of the mine.

Jaras v. Wright, — Pa. —, 106 Atlantic 798, p. 800.

FELLOW SERVANTS—RELATION—NEGLIGENCE.

WHO ARE—MINERS PERFORMING DIFFERENT DUTIES.

An employee in a mine was employed and engaged in doing timbering or carpenter work and his working place at the time of his injury was in an ore chute below the bulk head. At the same time the working place of machine men engaged in drilling was in the raise above the bulk head. The bulk head or lagging on the top of the chute could be considered as a wall separating the place of work of the timberman and that of the machine men. Under these facts the timberman was not a fellow servant of the machine men; but on testimony denying the particular situation at the time of the injury, the question of the relation of the timberman and the machine men was one of fact.

Arrascada v. Silver King Coalition Mines Co., — Utah —, 181 Pacific 159, p. 161

COMBINED NEGLIGENCE OF OPERATOR AND FELLOW SERVANT—QUESTIONS OF FACT.

A miner was by the sudden starting of a car thrown against a prop or post placed near the car track and received injuries for which he sued. The negligence of the car driver in starting the car suddenly could not be regarded as the proximate cause of the injury if the mine owner was negligent in placing and maintaining the prop or post too near the track, but these were questions of fact to be determined by the jury on the trial of the case.

Birmingham Fuel Co. v. Taylor, — Ala. —, 81 Southern 630, p. 631.

DEVIATION FROM DUTY—LIABILITY OF EMPLOYER.

A mining corporation or an oil company is liable for injuries inflicted by the negligence of an employee where a deviation from the instructions of the employer or from the line of duty of the employee is a mere incident to the discharge of the duty which the employee is performing at the time such departure occurs, and after the termination of which the authorized service is resumed.

Pierce-Fordyce Oil Association v. Brading, — Tex. Civ. App. —, 212 Southwestern 707, p. 709.

CONTRIBUTORY NEGLIGENCE OF MINER.

QUESTION OF FACT.

Where reasonable men might honestly differ in their conclusion and where the facts pleaded are of a character to be reasonably subject to more than one inference as to whether contributory negligence on the part of the plaintiff existed, then the question is one for a jury to determine.

Fauvre Coal Co. v. Kushner. — Ind. —, 123 Northeastern 409, p. 413.

INJURY BY EXPLOSION—QUESTION OF FACT.

An oil-well driller while engaged in the drilling of an oil and gas well was injured by being struck by a piece of an acid tank used for storing explosives and which exploded by reason of the negligence of the employer. Before the explosion the plaintiff had observed a fire nearby and near to a building where nitroglycerin and other explosives were stored. Thereupon he with others went a distance of one-half to three-quarters of a mile, and while at such distance heard three explosions, the last of which was a big one, and believing that the explosives had all exploded he with the other persons returned to the vicinity of the burning building and was on his way to his work when struck and injured. Under these facts the question of the contributory negligence of the plaintiff was one of fact to be determined by a jury in the trial of a suit for damages.

American Glycerin Co. v. Hill, 255 Federal 841.

QUESTION OF LAW.

Where the question of a plaintiff's contributory negligence is involved it is only when the evidence is of such a nature that all reasonable men upon the facts shown would say that the plaintiff was guilty of negligence that it becomes a question of law and is sufficient to justify a court to direct a verdict against the complainant.

American Glycerin Co. v. Hill, 255 Federal 841, p. 842.

BURDEN OF PROOF.

In an action by an oil-well driller for personal injuries caused by an explosion, the burden of proof to establish the contributory negligence of the complainant was on the defendant, and such contributory negligence must be established by a preponderance of the evidence.

American Glycerin Co. v. Hill, 255 Federal 841, p. 843.

SUDDEN PERIL—DUE CARE.

The fact that a miner saw another way of acting when suddenly called upon to extricate himself from a dangerous position, though it might have conserved his safety, does not of itself render him guilty of contributory negligence in resorting to the mode of escape he actually adopted. To have this result the danger of the one and the safety of the other must be obvious to a reasonable and prudent observer. But in the sudden emergency the question of due care becomes one for the jury.

Birmingham Fuel Co. v. Taylor, — Ala. —, 81 Southern 630, p. 632.

DISOBEYING RULE.

Where the duties of an employee in given circumstances are peculiarly specific any unambiguous and reasonable rule of the employer of which the employee has knowledge and to which he has consented by entering and continuing in the service binding, and his nonobservance or disobedience of any such rule at the time when it is capable of observance, is a matter of law, and is not to be judged by the undefined and varying requirements of ordinary care.

West Kentucky Coal Co. v. Smithers, — Ky. —, 211 Southwestern 580, p. 581.

DRIVING MULE WITHOUT REINS.

Driving a mule without reins in a mine can not be said to be obviously dangerous; and a mule driver can not be said to have voluntarily and unnecessarily practiced driving without reins where the animal was delivered to the driver by the mine operator without the equipment of reins as this was in effect a command to drive without the reins.

Brilliant Coal Co. v. Bartin, — Ala. —, 81 Southern 828, p. 830.

PLEADING—INSUFFICIENT ALLEGATION—DEFENSE.

The driver of a mule in a coal mine was injured by a fall of rock from the roof. The fall was occasioned by the mule striking and knocking down a prop leaving the roof unsupported. A plea by the defendant alleged that the driver "holloed" at the mule he was driving loose in the mine thereby causing the mule to turn near the prop and knock it down does not show that the driver gave the wrong direction to the mule following which the catastrophe happened and therefore there is nothing to support an inference of negligence on

the part of the injured driver. The fact that the driver "holloed" at the mule "does not import an address so rude as might be expected to shock the sensibilities of a mule, and so to drive him to disorder and dangerous action." The fact that the driver knew the mule was "vicious" does not tend to show that his attempt to command the mule by speech was unadvised or improper or in any way negligent. It may be assumed that the driver's "hollo" was a command to the mule to do the right thing in terms supposed to be intelligible to his mulish intelligence. The mule's disobedience can not be translated into contributory negligence on the part of the driver.

Brilliant Coal Co. v. Barton, — Ala. —, 81 Southern 828.

EXPLOSION OF GAS.

In an action by the owner of a residence for damages for loss of property by fire caused by a natural gas explosion, the owner is not to be charged with contributory negligence because he insisted upon having the drip pipe placed in the basement rather than out of doors, where there was evidence that there was no inherent danger of an explosion of gas due to the placing of the drip pipe in the basement and where it also appeared that the entire gas supply to the house could be cut off by closing a stopcock in the service pipe thereby obviating all possible danger of fire during the cleaning of the drip pipe.

Willard v. Valley Gas & Fuel Co., — Cal. —, 182 Pacific 32, p. 33.

ASSUMPTION OF RISK.

RISK ASSUMED.

ORDINARY RISKS AND KNOWN EXTRAORDINARY RISKS.

A miner by entering and continuing in the employment of mining operations without complaint assumes the ordinary risks and dangers of the employment as well as the extraordinary risks and dangers which he knows and appreciates and the risks and dangers of defects in the place, structure, or work, which are so patent as to be readily observable by the use of his senses, his age, intelligence, and experience considered.

Ozark Min. Co. v. Silva, 255 Federal 821, p. 824.

RULE OF COMMON LAW—COMPENSATION—RATE OF WAGES.

The answer that the common law makes to the hardship of requiring the employee to assume all consequences, both personally and pecuniarily of injuries arising out of the ordinary dangers of

the occupation is that the parties enter into the contract of employment with these risks in view and that the consequences ought to be and presumably are taken into consideration in fixing the rate of wages.

Arizona Copper Co. v. Hammer, 39 Supreme Ct. Rep. 553, p. 556.

CONTRACT TO DRILL OIL WELL—OPTION TO USE OLD HOLE.

A driller contracted to drill an oil well to a depth of 2,000 feet and to deliver to the landowner a good clean hole. The contract gave the driller the option of using an old abandoned well or hole that had been drilled two-thirds of the distance and abandoned because of the inability of the original driller to finish it in a workmanlike manner. If the drill could complete the well without trouble the contract would be an exceedingly profitable one to him and to get the benefit of this chance the contractor assumed risks that went against him in his effort to complete the well and make a good clean hole. The well did reach the depth of 2,000 feet and thereby gave the landowner the benefit of the test of the territory, but the driller under the terms of the contract was entitled to no compensation if he failed to furnish a good clean hole, the only thing for which the landowner agreed to pay.

Bain v. White, 256 Federal 428, p. 434.

RISKS NOT ASSUMED.

DEFENSE—FAILURE TO PLEAD.

In an action by a miner for damages for injuries where the defense of assumed risk was not pleaded, the court, by its instructions, should not submit that issue to the jury.

Texas & Pacific Coal Co. v. Ervin, — Tex. Civ. App. —, 212 Southwestern 234, p. 235.

LATENT AND UNKNOWN DANGERS.

A miner employed in a mine does not assume risks and dangers that are latent, that though known to the employer, are unknown and unappreciated by him, and are not readily observable by a person of his age, intelligence, and experience.

Ozark Min. Co. v. Silva, 255 Federal 821, p. 824.

INJURY TO MUCKER—OPERATOR'S FAILURE TO INSPECT.

A mucker in a mine was injured by a fall of rock from the side of roof of a hole in which he was working. His only protection from

injury lay in the care and precaution exercised by the mine operator in having the walls and roof of the hole properly inspected. Under such circumstances the mucker did not assume the risk of injury.

Wooton v. Dragon Consol. Min. Co., — Utah —, 181 Pacific 593, p. 595.
See Miller v. Utah Con. Min. Co., — Utah —, 178 Pacific 771.

PROXIMATE CAUSE OF INJURY.

OBEYING ORDERS OF SUPERIOR.

An electric helper in a mine while riding on a car on a railway in the mine propelled by an electric motor, and while in his employment as an electrician's helper, was ordered by his superior to throw off his tools and to get off at a certain place. At the point designated the electrician threw off his box of tools and himself safely alighted from the car and was walking along by the side of it. While so walking the superior, who had given the order himself, attempted to alight from the car, but his clothing was caught by a projecting bolt and by reason of which he was carried along until his body came in contact with the electrician, knocking him down and under the car, in consequence of which he received the injuries complained of. The negligence charged was that the superior negligently ordered the electrician to alight from the car and that the complainant conforming to said order received the injuries. The order of the superior directing the electrician to alight was evidently not the proximate cause of the injury as in obedience to that order the electrician safely alighted from the car and thereupon an unforeseen and an entirely different agency operated to produce the injury.

Woodward Iron Co. v. Gamble, — Ala. —, 81 Southern 810.

MINE INSUFFICIENTLY LIGHTED—COMPETENCY OF WITNESS.

In an action by a motorman for damages for an injury caused by a switch being improperly turned the alleged negligence of the mine operator in failing to properly and sufficiently light the mine can not warrant a recovery where, under the evidence the improper lighting in no way contributed to the accident that caused the injury.

Texas & Pacific Coal Co. v. Sherbley, — Tex. Civ. App. —, 212 Southwestern 758, p. 760.

CONTRACTS RELATING TO OPERATIONS.

CONTRACT OF SALE—BREACH AND FORFEITURE—CONSTRUCTION.

A contract for the sale of a mine provided that on default of the purchaser the contract should become void, and all payments should be forfeited and to be deemed as liquidated damages, and upon de-

fault the party of the second part "shall immediately deliver up possession of said mining claims to said first parties together with all improvements placed thereon by said second party." This contract can not mean that it is only the installment payments that are deemed liquidated damages in case of a forfeiture of the contract, and the clause relating to the improvements must be considered as a penalty to be awarded to the owners only in so far as he may show that he has suffered actual damages from the breach of the contract. The purchaser had the right to extract ores from the mine and apply the proceeds to his own use, and the clause is not unreasonable, viewed as a consideration for this privilege, and the forfeiture clause necessarily extends to the improvements.

Siegloch v. Bisbee, — Wash. —, 181 Pacific 51, p. 54.

CONTRACT OF SALE—BREACH AND FORFEITURE—IMPROVEMENTS.

A contract for the sale of certain mines and mining claims stipulated that time was the essence of the contract and that on failure of the purchaser to pay the installments of purchase money the contract should become void and all payments and improvements placed in the mine should be forfeited and become the property of the seller. On breach of the contract the seller could claim a forfeiture of all the property which was more or less attached to the freehold and was of a permanent nature and added to the value of the property for the uses for which it was intended and to aid in the extraction of ore profitably and successfully. But the term could not include sundry loose mining tools, equipment, and supplies useful in the operation of the mine and its subsidiary activities, but in no sense improvements on the realty.

Siegloch v. Bisbee, — Wash. —, 181 Pacific 51, p. 53.

See *Smith v. Detroit, etc.*, *Gold Min. Co.*, 17 S. Dak. 413, 97 Northwestern 17.

OPTION CONTRACT TO PURCHASE—CONSTRUCTION.

A lease of a mine gave the lessee an option to purchase the mining property upon the performance of the conditions and the payment of certain stipulated sums and provided that in the event the lessee shall fail or neglect to keep or perform his part of the contract, "this option shall be forfeited and all previous payments made shall be forfeited as well as all machinery, tools and appliances placed thereon by the party of the second part." Such a contract is not a contract of purchase and sale governed by the legal principle applicable to vendor and vendee but is simply a lease with an option to purchase.

Virginia Min. Co. v. Haeder, 32 Idaho —, 181 Pacific 141.

Hammitt v. Virginia Min. Co., — Idaho —, 181 Pacific 336, p. 337.

PAROL AGREEMENT FOR LEASE—SPECIFIC PERFORMANCE.

The lessee of a coal mine under a parol agreement that has been clearly proved took possession of the mining property and made valuable, permanent improvements thereon under the assurance by the authorized agents and officers of the mining corporation as owner that a formal lease in accordance with the parol agreement would be executed, is entitled to have such parol agreement specifically enforced.

Oberman v. Red Rock Fuel Co., — W. Va., —, 99 Southeastern 66, p. 74.

AGREEMENT TO DRIVE HEADINGS—STATUTE OF FRAUDS.

A miner agreed with a coal mining company that he would furnish the labor, tools, and explosives and drive four rock headings in the coal mine of the corporation six feet in height and twelve feet in width, limited by the coal holdings of the company estimated to be 4,000 feet. The miner was to be paid at the rate of \$14 per lineal yard, payments to be made on the regular semimonthly pay days for the work done. The miner immediately proceeded with his preparations to perform the contract and secured the necessary tools, supplies and equipment and employed laborers and workmen to carry out the contract, but the mining company repudiated the contract and refused to permit him to enter upon and continue the work. The contract did not by its terms or by necessary implication extend the performance of the work beyond a year and was not therefore void under the statute of frauds. A contract is not within the statute of frauds merely because it was not expected to be performed within a year if it is one that under all the circumstances admits of performance within a year.

Rua v. Bowyer Smokeless Coal Co., — W. Va., —, 99 Southeastern 213, p. 216.

PAROL CONTRACT FOR MINING—CERTAINTY AND RATIFICATION.

Where a parol contract for certain mining operations was subsequently ratified or covered by letters and telegrams between the parties, which described the subject matter of the contract in general terms, a court, in a controversy arising over the contract, may go outside of the writings for the purpose of identification of the subject matter and if in doing so it can be definitely ascertained, the contract is not void for uncertainty.

Rua v. Bowyer Smokeless Coal Co., — W. Va., —, 99 Southeastern 213, p. 216.

INJURY TO MINING PROPERTY—JOINT TENANTS—JOINT ACTIONS.

Tenants in common of a mine must join in actions *ex delicto* for an injury to their common property, for the reason that the damages belong to them jointly. A cause of action for nonpayment of rent, breach of covenant for good mining and removal of property by lessee, is in the tenants in common jointly and their remedy is joint, as their interests are inseparable.

Himes v. Schmehl, 257 Federal 69, p. 71.

INDEPENDENT CONTRACTOR.

WHAT CONSTITUTES.

An independent contractor as applied to mining operations is one who exercises independent control over the mode and method by which he produces the results demanded by the contract. A contract that confers upon the mine owner much power in the way of directing the details of the mode and manner in which the work shall be done and deprives the contractee of any voice in the matter does not create the relation. A person is not an independent contractor unless he is vested by the contract with the right to control the mode and manner of doing the work.

Wooton v. Dragon Consol. Min. Co., — Utah —, 191 Pacific 593, p. 597.

LESSEE OF MINE—CONTROL BY OWNER.

A mine owner entered into a contract by which the contractee agreed to mine ore from the mine under the "direction and supervision" of the owner, at such place, at such times, and in such quantities as the owner should direct and place the ore mined in the owner's bin. The contractee or lessee was to furnish his own powder, fuses, caps, supplies, and labor and the owner was to furnish tools and air. The work was to be done in the customary and skillful and proper mining operation and according to the approval of the owner. This contract did not create the relation of an independent contractor, as the control reserved to the owner covered all details of the work, including direction and supervision as to times, places, and quantities, and approval of employees employed. By the contract the contractees were to hold the owner harmless from all suits, claims, and demands. The contractees were not independent contractors within the meaning of that term and the owner was not relieved from liability for injuries to a mucker, caused by a fall of rock due to a failure to properly inspect the place where the mucker worked.

Wooton v. Dragon Consol. Min. Co., — Utah —, 191 Pacific 593, p. 596.

LEASE OF MINE—SUBTERFUGE TO AVOID LIABILITY.

The lessor of a mine leasing the same to a lessee, or employing an independent contractor, is not liable for an injury to a miner employed by the lessee, or by the independent contractor. But as between the injured miner and the owner, or the lessor and lessee, or independent contractor, it is always a question as to the bona fides of the lease or contract, and where the proof shows that the owner or lessor was using the lessee or the independent contractor as a subterfuge to cover his own operations, it is then a question of fact whether the owner or lessor was the party in contractual relation with the injured miner.

Coal City Min. Corp. v. Davis. — Ala. App. —, 81 Southern 358, p. 359.

LIABILITY OF OWNER FOR INJURY TO EMPLOYEE OF CONTRACTOR.

An owner or lessor of a mine employing an independent contractor to operate the mine is not liable for an injury to an employee of the independent contractor who was under the direction and control of the independent contractor at the time of the injury, unless the owner or lessor was under some duty to the employee.

Coal City Min. Corp. v. Davis. — Ala. App. —, 81 Southern 358, p. 359.

EMPLOYEE HIRING MINER—BANK BOSS IN CONTROL.

An employee in a mine who hired and discharged miners and who had miners working under him was not an independent contractor where the entire mine was under the supervision of the bank boss and the person to whom superintendence was entrusted was compelled to obey his orders.

Alabama Fuel & Iron Co. v. Smith. — Ala. —, 82 Southern 30, p. 31.

METHODS OF OPERATING.

COAL MINED OUT—ABANDONMENT OF OPERATIONS.

The mining of coal to practical exhaustion and the actual removal of all equipment and means for carrying on further operations constitutes a deliberate and undoubted abandonment of the premises.

McClure v. Monongahela Southern Land Co., — Pa. —, 107 Atlantic 386, p. 388.

INSPECTION BY STATE MINE INSPECTOR—PROOF INADMISSIBLE.

A mine car driver while attempting to uncouple cars in a mine was injured by being caught between a car and a post set so near

the track that he could not pass between the car and the post. The post had been maintained in that position for many years. The fact that the State mine inspector had inspected the mine and raised no objection to the construction complained of as negligent was not admissible in an action by the miner for damages, in the absence of a statute authorizing him to prescribe or approve the construction and proof that he had done so.

Birmingham Fuel Co. v. Taylor, — Ala. —, 81 Southern 630, p. 632.

INSUFFICIENT LIGHT—COMPETENCY OF WITNESS.

On the issue as to whether a mine owner was negligent in having his mine improperly lighted at the time of an accident it is not proper to permit a witness to testify that the mine was poorly lighted at the point of the accident unless the witness qualified as an expert. It was for the witness to state facts upon which the jury might base a verdict that the mine was so improperly lighted as to constitute actionable negligence.

Texas & Pacific Coal Co. v. Sherbley, — Tex. Civ. App. —, 212 Southwestern 758, p. 760.

RIGHT TO SURFACE SUPPORT.

INJUNCTION TO PREVENT REMOVAL.

Equity has jurisdiction to restrain a mining company from beginning de novo to mine in and under property that the predecessor in title disclaimed and which that company itself protested had been exhausted and abandoned. Under such circumstances the plaintiff is not required to establish first a paramount title in an action at law.

McClure v. Monongahela Southern Land Co., — Pa. —, 107 Atlantic 386, p. 387.

NUISANCE.

OIL FROM PIPE LINE.

A pipe line leaking oil upon and over the lands across which the line is laid constitutes an abatable nuisance.

Indiana Pipe Line Co. v. Christensen, — Ind. —, 123 Northeastern 789, p. 790.

PERMANENT AND TEMPORARY INJURY—DAMAGES.

A landowner sued a pipe-line company for damages for injuries to his land caused by oil that escaped from the pipe line being carried over and settled upon and in the soil. The evidence showed an injury to the products of the soil and that the landowner's stock

pasturing on the land was injured and some killed as a result of oil swallowed in eating grass and drinking water on the land. The landowner was entitled to recover damages for these items of loss, but under the evidence he was not entitled to an award of damages on account of permanent injury to the productive qualities of the soil. There was no evidence to show that the fertility of the soil was destroyed and that the land would remain in the same condition for an indefinite period.

Indiana Pipe Line Co. v. Christensen, — Ind. —, 123 Northeastern 789, p. 794.

STORING EXPLOSIVES IN THICKLY SETTLED PLACES.

An oil company maintaining a warehouse and storage tanks in a thickly settled portion of the city which contained oil, gasoline, kerosene, and other high explosives maintained both a public and a private nuisance.

McGuffey v. Pierce-Fordyce Oil Association, — Tex. Civ. App. —, 211 Southwestern 335, p. 337.

INJUNCTION.

OIL AND GAS—EXPLORATIONS IN BEDS OF STREAMS.

The statute of Louisiana (Act No. 30, 1915), authorizes the Governor of the State to lease the beds of certain streams and lakes to private individuals for the purpose of boring for oil and gas. Act No. 29 (Extra Session, 1915), provides that lessees of the State should not be enjoined in their operations for oil and gas in river bottoms and lake bottoms the ownership of which was in the State, but the person claiming to own the land should be confined to a demand that the oil and gas produced should be judicially sequestered and the title determined. The legislature by the latter act provided a means for the protection of all concerned by permitting drilling operations to be carried on by lessees of the State, leaving to the courts to decide who should ultimately be the owners of the product. Under these acts a lessee of the State is entitled to an injunction to prevent a landowner from interfering through force and violence with the lessee in his operations for oil and gas in the beds of certain named streams.

Wemple v. Eastham, 144 La. —, 81 Southern 438, p. 439.

MINING LEASES.

LEASES GENERALLY—CONSTRUCTION.

NATURE—CONSTRUCTION.

A State mining lease under the statute of Minnesota is not a conveyance of ore in place but it is in fact as it is in form a lease.

State v. Cavour Min. Co., — Minn. —, 173 Northwestern 415.

STATE LEASE—CONSTRUCTION—ROYALTIES—RIGHTS OF LESSEE.

A State mining lease provided that there should be a minimum output of 5,000 tons annually and if that number of tons was not mined the lessee should pay the State a royalty of 25 cents per ton on 5,000 tons. The minimum royalty was the agreed compensation for the use and occupancy for a year of the leased premises for the purposes and uses and in the manner and with the rights fixed by the lease. The lessee by the lease obtained the right to take within the year 5,000 tons of ore on which he must pay the stipulated royalty and he was likewise bound to pay the royalty on that amount of ore even if no ore was mined. If he failed to mine any ore in a given year or mined less than the stated 5,000 tons he was not entitled to have his annual payment of \$1,250 for such year applied wholly or in part on royalties accruing in subsequent years on ore mined in such years in excess of the 5,000 tons, in the absence of an agreement in the lease to that effect.

State v. Cavour Min. Co., — Minn. —, 173 Northwestern 415.

STATE LEASE—CONSTRUCTION—ROYALTY ON UNWASHED ORE.

A State executed a lease of lands for the purpose of exploring for, mining, taking out and removing therefrom the merchantable and shipping iron ore. The lessee agreed to pay the State at the rate of 25 cents a ton for all the ore mined and removed. In the operation of the mine a body of lower grade ore was mined which could not be used in the furnaces under present furnace methods, but it could be mined and washed in a washing plant constructed upon the leased premises and the concentrates shipped to the furnace and sold at a profit after paying the mining, washing, and transportation charges

and the royalty. But no profit would result if the ore was shipped to the furnaces and washed there, as the cost of transportation prevented such operations. Under the lease the mined ore before washing was the ore referred to and upon which the lessee under the terms of the lease must pay the royalty of 25 cents per ton and not upon the lesser tonnage of concentrates.

State v. Hobart Iron Co., — Minn. —, 172 Northwestern 899.

CONSTRUCTION—RIGHT TO EXTEND TERM.

A mining lease was for a period of five years and gave the lessee the right to mine and remove fluorspar during the period. The lease provided: "So long as second party may hold in its possession this title paper, or fail to give notice to the first parties of its intention to surrender said lease, then second party will be liable for and shall pay each year the minimum guaranteed royalty of \$50 whether the said mines are worked or not and should second party fail to pay the royalty as stipulated herewith, or fail in any material way to live up to this contract then first party shall have the right to declare a forfeiture and terminate." This means that the lessee had the right to surrender the lease and avoid liability for the royalty by surrendering the title paper at any time within the five years, but if not then he should be responsible for the royalties whether the mines were operated or not. This provision did not extend the period beyond the five years but gave the lessee the privilege of terminating it within five years, and by its own terms the lease terminated five years from its date and thereafter the lessee had no further rights upon the premises.

Kentucky Fluorspar Co. v. Pierce, — Ky. —, 213 Southwestern 542, p. 545.

VALIDITY OF LEASE—GOOD FAITH OF LESSOR—BURDEN OF PROOF.

The Rising Sun Mining Company, the owner of a large tract of zinc land, in order to promote its sale, leased one of its mines together with the mill situated thereon, to certain persons and gave the lessee an option to purchase. The lessee operated the same as a firm or company and subsequently all withdrew but one who continued to operate the mine and became largely indebted and insolvent. Thereafter the Rising Sun Mining Company sued the retiring members to recover an alleged indebtedness due from the firm to the company. The action was defended on the ground that the lease was a simulated one and that there was a secret understanding that the lease should never become binding and that the mine was in fact operated for the Rising Sun Mining Company and was intended to aid the company in making a sale of its mineral lands. The burden of

proof was upon the defendants to maintain this affirmative defense, and failing to establish the facts by the burden of proof, the plaintiff was entitled to a judgment.

Deane v. Rising Sun Min. Co., — Ark. —, 213 Southwestern 399, p. 400.

AGREEMENT TO EXECUTE—STATUTE OF FRAUDS—MEMORANDUM.

An agreement was entered into between a landowner and the president of an oil company by which the landowner upon the payment of a bonus of \$10,000 was to execute a lease of his land for oil purposes. The contract was not in writing but the president of the company delivered to the landowner at different times and in different amounts checks of the company. These were indorsed to the effect that the amount was an "installment of bonus on lease" on certain described lands; and on one was the statement "in full settlement of within account." This indorsement was signed by the landowner. The memoranda indorsed on the checks do not indicate to whom the lease was to be executed and they were not signed by the party to be charged. His signature on the back of the checks was an acknowledgment of the receipt of the payments "in settlement of the account," referring to the installments on the bonus agreement. The memoranda were not sufficient to take the agreement out of the statute of frauds and did not evidence an enforceable contract to execute a lease to the oil company.

Hibernian Petroleum Co. v. Davies, — Cal. App. —, 181 Pacific 836, p. 837.

LESSOR'S ELECTION NOT TO FORFEIT—LESSEE'S LIABILITY FOR RENT FOR FULL TERM.

The owners of an unpatented mining claim leased a portion of the surface for business purposes for a term of five years. The lessee was permitted to erect thereon suitable buildings for the purpose of doing a hay and grain business and was given the right to remove the buildings within 20 days after the expiration of the lease if the lessor did not exercise the option given him to purchase the buildings. If any of the payments should be due and unpaid the lessor was given the right to reenter and terminate the lease, or the lessor might waive such default and continue the lease in force and thereupon rental for the full term should become due and payable. On the failure of the lessee to pay the installments of rent as provided, the lessor brought suit to recover the entire rent for the full term, thereby electing to depend upon the recovery of the rent rather than the forfeiture of the lease. The lessee in an action for the rent by the lessor could not defend on the ground that the lessor had not in fact completed a valid mining location.

Lynch v. Clark, — Ariz. —, 179 Pacific 960, p. 961.

JOINT LEASE—JOINT COVENANT—ACTION BY ONE COOWNER.

Two joint owners of a graphite mine leased the same for operation. The rent was made payable to the lessors jointly and all the covenants of the lease run to the lessors jointly. Under such a lease one coowner can not maintain an action for an accounting or for damages for a breach of the covenants or for rent due for his particular share according to his separate interest.

Himes v. Schmehl, 257 Federal 69, p. 70.

OPTION CONTRACT TO PURCHASE—EXTENSION OF TIME—CONSTRUCTION.

A mining lease contained an option by which the lessee should have the right to purchase the mining property on performance of the conditions stated. The lease and the option agreement expressly provided that "time is of the essence of this agreement." The time for making the stipulated payments was subsequently extended by a written agreement between the parties. But the written agreement, based upon a valuable consideration, extending the time in which payments upon the original contract must be made to a definite date, did not operate as a waiver of the provision in the contract making time of the essence thereof.

Virginia Min. Co. v. Haeder, 32 Idaho —, 181 Pacific 141, p. 142.

Hammitt v. Virginia Min. Co., — Idaho —, 181 Pacific 336, p. 337.

OPTION CONTRACT—FORFEITURE.

A mining lease for a definite period contained an option for the purchase of the mining property, but it did not contain any express provision for forfeiture. Under such a lease it is doubted whether a forfeiture could be enforced.

Grant Chrome Co. v. Marks, — Ore. —, 181 Pacific 345, p. 346.

OPTION CONTRACT—CASH BONUS—MUTUALITY.

A mining lease provided for the mining of minerals on a royalty basis and gave the lessee an option to purchase upon the payment of a stipulated sum in cash. The contract stated that the consideration was \$1 paid by the lessee to the lessor and the mutual benefits that would flow to both parties by the fulfillment of the lease. Such an agreement was not unilateral but was supported by a valuable consideration including mutual benefits and, therefore, was valid and binding.

Crawford v. Williams, — Ga. —, 99 Southeastern 378, p. 381.

DESCRIPTION AND QUANTITY OF LAND.

Evidence of the acreage of land in an oil and gas lease where the number of acres is followed by the words "more or less" has

little weight as against specific boundaries. But where a doubt exists as to the actual location of the boundary, and the lease contains no words to definitely fix the line by either metes or bounds or monuments, evidence of acreage becomes a material factor in determining the intention of the parties. In such case it is competent to show that the quantity of land called for in the lease and the quantity included within the boundaries as contended for correspond with each other.

Dawson v. Coulter, — Pa. —, 106 Atlantic 187, p. 188.

DEATH OF LESSOR—RIGHT TO REMOVE MINERALS—OPEN MINES.

Mines opened under a lease executed prior to the death of the lessor and that give power and authority to enter, mine and remove the mineral products subject to rents and royalties reserved, will be considered open mines at the time of the lessor's death, though then not actually opened, so far as the right of the wife to dower or the husband to curtesy in such royalties is concerned.

Bramer v. Bramer, — W. Va. —, 99 Southeastern 329, p. 330.

See Alderson v. Alderson, 46 W. Va. 242, 33 Southeastern 228.

CONTRACT TO PURCHASE ORE—SCHEDULE OF PRICES—MARKET PRICE.

A mining lease provided that the lessee was to deliver all merchantable ore which should be accounted for by the lessor upon the terms and conditions of its schedule and announcement of prices being paid by it at its mill at the time of the shipment. There was nothing in the lease showing that the parties intended to make the schedule and announcement of prices at all times conform to the prevailing market prices. The language employed can not be construed to mean that the lessor should pay the market price or that any price was intended other than the one scheduled and announced by him.

Wolf Tongue Min. Co. v. Hinman, — Colo. —, 182 Pacific 16.

SALE OF ORE—SCHEDULED PRICES—PAROL EVIDENCE TO CHANGE.

A mining lease fixed the prices to be paid for ore according to a schedule and announcement of prices by the lessor paid by it at its mill at the time of shipment. Under such a lease and contract parol evidence was not admissible to show that the parties intended or agreed that the schedule or announced prices should correspond with or be the same as the prevailing market prices for such ore.

Wolf Tongue Min. Co. v. Hinman, — Colo. —, 182 Pacific 16.

COAL LEASES.

MINIMUM ROYALTY—CONSTRUCTION OF LEASE—MISTAKE—FORFEITURE.

A lease of a coal mine provided for the payment of \$1,000 per year as a minimum royalty and to cover the first 10,000 tons to be mined. It also provided for the payment of a royalty of 10 cents per ton for all coal mined in excess of the 10,000 tons. Effect must be given to the language used that provided for monthly settlement and the payment of royalties each month, but where there was a controversy over the construction of the lease as to the payment of the royalty and when a small sum was claimed to be due as royalty, the mistaken party will not be penalized to the extent of enforcing a forfeiture against him. The lessor in his action asked no judgment except that of forfeiture and in view of the length of the term created by the lease, the probable value of the improvements as contemplated by its terms, the amount of coal mined under the lease, the comparatively small amount due from the lessee, and the fact that the lessor demanded the sum claimed but one day before the bringing of the suit, will not justify a court of equity in decreeing a forfeiture of the lease. Equity has always been jealous of the right of forfeiture and has never enforced it unless the right has been so clear and insistent as to permit of no denial.

Harlan v. McGraw, — Wash. —, 181 Pacific 882, p. 884.

ROYALTY ON INFERIOR COAL.

A lessee of a coal lease who mined and used inferior coal not required to be mined by the lease must pay royalty as prescribed by the lease upon other coal which the lessee was required to mine and use. Under such a lease when the lessee took coal of any quality he took it as coal for which the royalty fixed by the lease must be paid.

State v. Hobart Iron Co., — Minn. —, 172 Northwestern 899.

See *Genet v. D. & H. Canal Co.*, 136 N. Y. 593, 32 Northeastern 1078.

Genet v. D. & H. Canal Co., 186 N. Y. 422, 79 Northeastern 437.

Ellis v. Cricket Coal Co., 166 Iowa 656, 148 Northwestern 887.

Flavelle v. Red Jacket, etc., Co., — W. Va. —, 96 Southeastern 690.

DEATH OF LESSOR—RIGHT OF LIFE TENANT TO ROYALTIES.

Where a coal mine was opened and operated under a lease during the lifetime of the deceased, the husband on the death of the lessor, his wife, as the life tenant by curtesy was entitled to the whole of the royalties due from subsequent operations under the lease.

Caudil v. Wagoner, — Ky. —, 212 Southwestern 422.

DEATH OF LESSOR—RIGHTS OF REMAINDERMEN AS AGAINST LIFE TENANT.

Coal mines leased by a married woman were opened and operated during her lifetime. Upon her death during the term of the lease her surviving husband became the owner of the land as life tenant by curtesy. The lease was subsequently abandoned by a purchaser from the original lessee, who thereupon purchased the fee in the coal land from the remaindermen, the children of the deceased lessor. As the land had been impressed as mineral land and the mines opened and operated in the lifetime of the lessor, all royalties from coal mined belonged to the husband as life tenant by curtesy, the remaindermen inherited their interest in the land with this burden imposed upon it and a purchaser from the remaindermen took no greater interest in the land than that owned by them and the rights of such a purchaser were subject to the life tenant's rights therein.

Caudil v. Wagoner, — Ky. —, 212 Southwestern 422.

PAROL AGREEMENT TO LEASE—SPECIFIC PERFORMANCE.

The lessee of a coal mine who under a parol agreement entered into by the agents and officers of a coal-mining corporation entered into the possession of the property and made valuable permanent improvements under the assurance that a formal lease in accordance with the parol agreement would be executed by the mining corporation, is entitled to have the parol agreement specifically enforced.

Oberman v. Red Rock Fuel Co., — W. Va. —, 99 Southeastern 66, p. 74.

RIGHTS OF LESSEE AS AGAINST RECEIVER.

The holders of the bonds of a mining company that had defaulted in payment of interest consented to a lease of the mining property and the lessee entered into possession, made valuable and permanent improvements, and was in good faith conducting the mining operations. Subsequently the bondholders directed the trustee to foreclose the trust deed and in the foreclosure proceedings a receiver was appointed who took possession and operated the mining property. Upon the final determination of the controversy a decree was entered to the effect that the bondholders were estopped to contest the validity of the lease and the lessee was granted the right to resume operations. The lessee was entitled to an accounting by the receiver for the personal property taken over and the coal mined during the time he had been in possession less the agreed royalty, but he was not to be charged with any portion of the compensation allowable to the receiver for his services.

Oberman v. Red Rock Fuel Co., — W. Va. —, 99 Southeastern 66, p. 75.

SALE OF LEASE—APPLICATION OF DEPOSIT—LIABILITY OF BANK.

The Ryegate Coal Mining Company held a lease of certain coal land and agreed to sell and assign the lease free from all encumbrances held upon the land by the State by reason of debts due the State by the mining corporation. A part of the consideration was to be paid in cash and the balance by a credit to be given the corporation upon an account due from it to a third person. It was agreed that the cash and the receipted bill should be deposited in a bank to be held as an escrow in trust and to be paid over to the mining company when the State charges had been paid. On information that the State's charges had been paid and the lease free from encumbrances, the bank was authorized to apply the deposit of money to a debt due it from the mining corporation and it could not be held liable to the purchaser of the lease because he was unable subsequently to give the bond required by the State.

Glendening v. Slaten, — Mont. —, 179 Pacific 819.

SUIT TO FORFEIT—AMENDMENT OF COMPLAINT.

A coal mining lease required the lessee to pay a minimum royalty of \$1,000 per year to cover the first 10,000 tons or less of coal mined. The payments were to be at the rate of \$100 per month. The lessee was to pay on all coal mined in excess of the first 10,000 tons per year a royalty of 10 cents per ton, payable monthly. It was stated in the lease that time was the essence of the contract and on failure of the lessee to pay in full any year's rental or his failure to perform any of the conditions of the lease then it might be forfeited and terminated at the option of the lessor. In an action to forfeit the lease the lessor averred that there was a large sum due as royalties and that liens had been filed against the mine amounting to large sums. The lessee denied these allegations and alleged that all the claims had been fully paid. At the time the case was called for trial the lessor asked leave to amend the complaint by an averment that the lessee had committed great waste in mining in that he had thrown out and used as ballast upon a railroad track a large amount of coal for which no account had been made. The suit was for a forfeiture and cancellation of the lease only, and as the lease gave the lessor the right of oversight and inspection of the mining operations, and as he permitted the lessee to mine and use coal for ballast and to exclude the material so used from the royalty account, he was not entitled to claim a forfeiture by reason thereof, at least until after demand, and he was not entitled to make the proposed amendment to his complaint.

Harlan v. McGraw, — Wash. —, 181 Pacific 882, p. 883.

FORFEITURE—LABOR LIENS.

A coal mine lease required the lessee to operate the mine and to pay a stipulated annual royalty to cover the required number of tons to be mined, and pledged the entire mining equipment for the payment of all royalties, and the lien of the lessor on the mine equipment was to be prior to all labor liens. Under these provisions the filing of labor liens upon the property was not such a breach of the lease as would warrant a forfeiture, where the liens had been fully paid before the suit was instituted to forfeit the lease.

Harlan v. McGraw, — Wash. —, 181 Pacific 882, p. 884.

OIL AND GAS LEASES.

CONSTRUCTION—CONVEYANCE OF MINERAL RIGHTS—DEFEASANCE.

A lease or conveyance provided that the lessee or grantee was to have and hold for a term of five years and as much longer as gas, oil, gold, silver, coal, lead or zinc was produced in paying quantities from the land. The instrument, though designated as an oil lease, was a conveyance of the mineral rights in the land subject to defeasance either for failure to drill a well or pay the rentals stipulated and subject to the further contingency of a termination of such title after the expiration of the five-year period by failure to discover any of the mineral in paying quantities.

Key v. Big Sandy Oil & Gas Development Co., — Tex. Civ. App. —, 212 Southwestern 300, p. 301.

CONSTRUCTION OF CONTRACT—IMPLIED COVENANT TO DEVELOP.

In order to enable a purchaser of a certain tract of land to acquire a merchantable title thereto and in order to effect an adjustment of the rights and interests of the holder of an enforceable contract with the owner for an oil and gas lease thereon and for the purchase of an interest in the lands, the purchaser entered into a written contract with the holder of the contract for the oil and gas lease to the effect that in consideration of a release of the outstanding contract and a quit claim deed to the premises and other agreements mutually entered into whereby the holder of the original contract reserved the oil and gas appurtenant to the premises for a term of 15 years with the privilege of entry and accompanying developing rights. There was no implied covenant in such a contract that required the lands to be explored and developed with reasonable diligence as is commonly required in the case of an ordinary oil and gas lease.

Kroeger v. Martin, — Okla. —, 180 Pacific 955, p. 957.

CONSTRUCTION—DEVELOPMENT DELAYED—UNFORESEEN CONTINGENCIES.

It is not unreasonable to say that the parties when executing an oil and gas lease and contemplating the production of oil, had in view that by the happening of some untoward event, or the failure of the lessee's expectations to be realized within the time that might reasonably be expected, the lessee might be delayed beyond the term of the lease in producing oil or gas in paying quantities; but if he was diligently and efficiently prosecuting the work of development at the termination of the time stated, and had theretofore demonstrated that the land was oil producing land it was within the contemplation of the parties that he might continue at least the operations in which he was then engaged to their completion and if the operations resulted in the production of oil or gas in paying quantities, they would have the same result under the clause extending the lease beyond the fixed term as though this result had been accomplished during the period named. But such operations, to be effective, must be vigorous, diligent, and efficient, convincing that the real purpose was to strike "pay dirt" at the earliest possible moment.

Ohio Fuel Co. v. Greenleaf, — W. Va. —, 99 Southeastern 274, p. 279.

CONSTRUCTION—TIME AS ESSENCE.

In an oil and gas lease time is ordinarily of the essence of the contract and a proper construction of the language used will not limit the lessee to the particular term mentioned in the lease where he has demonstrated that the leased land is underlaid with oil or gas and is proceeding with all diligence in an efficient manner to produce the oil or gas therefrom in paying quantities.

Ohio Fuel Oil Co. v. Greenleaf, — W. Va. —, 99 Southeastern 274, p. 279.

CONSTRUCTION—PURPOSE—RIGHTS AFTER EXPIRATION.

An oil and gas lease was given for the term of one year and as long thereafter as oil or gas was produced from the demised premises. The purpose of the lessor was to have the oil and gas produced and marketed so that he might receive the royalties therefrom, and this purpose is a material element to be considered in the construction of such a lease. Such a lease does not justify operations after the expiration of the specified term, unless within that time oil or gas has been produced in paying quantities, or unless within such time the lessee has demonstrated that the land is underlaid with oil or gas and he is at the expiration of the time making diligent and efficient

efforts to produce it in paying quantities. But under such a lease the lessee can not upon the discovery of a trace of oil or gas, lie idle and insist that this discovery vested in him a right to produce oil and gas at any time he might choose to operate in the future.

Ohio Fuel Oil Co. v. Greenleaf, — W. Va. —, 99 Southeastern 274, p. 276.

CONSTRUCTION—CONSIDERATION—BEGINNING OF RENTAL PERIOD.

An oil and gas lease provided that the lessee should complete a well on the leased premises within one year from its date or pay at the rate of \$20 for each additional year completion was delayed. No time was fixed in the lease as to when the rentals should become due and payable. Applying the strict rule of construction as against the lessee and in favor of the lessor the rental was payable in advance at the beginning of the year for which it was to be paid.

Maud Oil & Gas Co. v. Bodkin, — Okla. —, 180 Pacific 959, p. 960.

See Bearman v. Dux Oil & Gas Co., — Okla. —, 166 Pacific 199.

Dill v. Frazee, 169 Ind. 53, 79 Northeastern 971.

CONSTRUCTION—DELAY RENTALS—ACCEPTANCE AVOIDS FORFEITURE.

Where an oil and gas lease provided for the payment of a certain annual rental in case a well was not drilled within a stated time, the payment and acceptance of annual rentals was a full discharge of the obligations of the lease. But the lessor could at any rental period decline to further accept the rentals and require the lessee to begin operations for oil or gas. The agreement to pay the rental was absolute if the well was not drilled, and if not paid the rent was recoverable, and if not paid the lease could be forfeited. But the payment and acceptance of rentals fully and completely extended the agreement to explore from time to time until it was complied with by the completion of a well. A lessee was not in fault in not drilling a well within a year and the payment or the deposit of the rental according to the lease was a waiver of the right to declare a forfeiture.

Ohio Valley Oil & Gas Co. v. Irvin Development Co., — Ky. —, 212 Southwestern 110, p. 112.

See American Window Glass Co. v. Indiana Natural Gas & Oil Co., 37 Ind. App. 439, 76 Northeastern 1007.

CONSTRUCTION—MUTUALITY.

An oil and gas lease was for a stated term of years or as long as oil or gas was produced, and provided that operations should be commenced within one year or if not the payment of a certain stated annual rental, and gave the lessor a certain royalty on the oil and

gas produced. Such a lease is not void for want of mutuality, and is not a unilateral contract.

Ohio Valley Oil & Gas Co., v. Irvin Development Co., — Ky. —, 212 Southwestern 110, p. 112.

See Hughes v. Parsons, 183 Ky. 584, 209 Southwestern 853.

CONSIDERATION—CASH BONUS—MUTUALITY—SURRENDER CLAUSE.

An oil and gas lease provided that the lessee should commence drilling a well within one year from its date or pay an annual rental of \$20. The lease also provided that the lessee might at any time upon the payment of the further sum of one dollar surrender the lease for cancellation and all payments and liabilities thereafter accruing would terminate. The lease was made in consideration of a cash bonus of one dollar. The down payment, or cash bonus, the consideration in the lease, supports all of its covenants and such a lease is not subject to cancellation merely because of the presence of the surrender clause.

Maud Oil & Gas Co. v. Bodkin. — Okla. —, 180 Pacific 959, p. 960.

See Rich v. Doneghy, — Okla. —, 177 Pacific 86.

Northwestern Oil & Gas Co. v. Branine, — Okla. —, 175 Pacific 533.

Overruling Brown v. Wilson, — Okla. —, 169 Pacific 94.

CONSIDERATION—MUTUALITY—SURRENDER CLAUSE—TERMINATION.

A landowner executed an oil and gas lease for certain lands for a term of five years for a cash consideration of \$240. The lessee agreed to pay to the lessor one-eighth of the oil produced and to pay a stipulated sum per annum for each gas well. The lessee was to complete a well on the premises within twelve months from the date of the lease or pay \$240 quarterly in advance for each year such completion was delayed. The lease contained the provision that upon the payment of one dollar at any time to the lessor, the lessee should have the right to surrender the lease for cancellation. Such a lease is not unilateral and is not void for want of mutuality, and the cash bonus supports each and all of the covenants of the lease and although no well had been commenced on the premises, the lessor had not the option to refuse timely tender of payments and terminate the lease.

Magnolia Petroleum Co. v. Saylor, — Okla. —, 180 Pacific 861.

See Northwestern Oil & Gas Co. v. Branine, — Okla. —, 175 Pacific 533.

Rich v. Doneghy, — Okla. —, 177 Pacific 86.

Shaffer v. Marks, 241 Federal 151.

CONSIDERATION—RESCISSION IN PART.

An action brought to annul in part and leave undisturbed in part an oil and gas lease affecting a large tract of land referred to

as a single unit, though composed of many tracks, proceeded upon the theory of a subsisting contract, notwithstanding an allegation that the lease was void from its inception. Such a contract being indivisible the complainant had no standing while holding on to benefits received and being received and while unable or unwilling to restore the status quo ante, to demand that it be annulled in those respects wherein he disapproved or derived no profits from its execution and be maintained or continued in those respects wherein he had found it profitable. The rights and obligations of such a contract considered as a whole are so interdependent and so real to the whole body of the land that they can not be divorced from each other or from the land.

Nabors Oil & Gas Co. v. McCormick, 145 La. —, 81 Southern 766, p. 767.

PAROL LEASE—PRESUMPTION AND VALIDITY.

A lessee of oil and gas producing property who has been in possession under a parol lease and conducting operations thereon for many years and accounting for the royalties to the owner, is presumed to be a parol lessee, or the facts justify the inference that he occupies the status of a parol lessee.

Drake v. O'Brien, — W. Va. —, 99 Southeastern 280, p. 283.

PAROL LEASE—VALIDITY—STATUTE OF FRAUD—TENANCY.

A parol lease for oil and gas is not valid if for a term of more than five years by reason of the inhibition of the statute of frauds; but a parol lease together with possession thereunder and payment of the royalties for many years creates at least a valid tenancy from year to year terminable, if at all, only by statutory notice, or until extinguished in some other proper form.

Drake v. O'Brien, — W. Va. —, 99 Southeastern 280, p. 284.

POWER OF ONE COTENANT TO LEASE—PAROL LEASE.

A tenant in common of oil-producing property having authority from his cotenant to lease the premises for oil production without limitation, except as to the amount of the royalties to be reserved, conferred upon him by the deed of his cotenant, may make a valid parol lease of the premises for exploration for oil or gas within the limitations prescribed by law.

Drake v. O'Brien, — W. Va. —, 99 Southeastern 280, p. 283.

RIGHTS OF COTENANTS.

A cotenant in partition proceedings where the land was ordered sold subject to an oil lease is entitled to an accounting for the rents

and royalties arising from the oil produced and marketed from the premises.

Miller v. Powers. — Ky. —, 212 Southwestern 453, p. 456.

RIGHT OF COOWNER TO LEASE JOINT PROPERTY.

Coowners are owners of part and of the whole and as neither has exclusive right to any determinate part of the property the owner of an undivided half of a tract of land has not the right to exploit the land for oil and gas by making a lease therefor without the consent of his coowner and he can not confer such right upon his lessee. Such a lease may be valid as to the lessor but it is void as to his coowner.

Gulf Refining Co. v. Carroll, 145 La. —, 82 Southern 277, p. 278.

See Gulf Refining Co. v. Hame, 135 La. 555, 70 Southern 512.

SALE OF PART OF LAND SUBJECT TO LEASE.

A purchaser of a part of a tract of land that has been leased to another for oil and gas operations takes the same subject to such lease. If the lessee thereafter discovers and produces oil or gas from the unsold residue of the leased premises, the purchaser of the other part is not entitled to an apportionment or share of the royalties accruing from the oil and gas so produced.

Kimbley v. Luckey, — Okla. —, 179 Pacific 928, p. 931.

DIVISION OF LEASED LAND—RIGHTS OF PURCHASERS.

Where an oil and gas lease is made to extend to the heirs, administrators, and assigns of both the lessor and lessee, and before the discovery and production of oil or gas thereon a part of the leased premises is conveyed to a third person, each owner is entitled to the profits and royalties arising and accruing from oil and gas produced on his separate tract, free of any claim or demand of the other. The purchaser takes the tract purchased by him subject to the oil and gas lease and he is not entitled to any apportionment or share of the royalties accruing from oil and gas produced on the part of the land retained by the original lessor.

Pierce Oil Corp. v. Schacht, — Okla. —, 181 Pacific 731, p. 733.

See Kimbley v. Luckey, — Okla. —, 179 Pacific 928.

Osborn v. Arkansas Territorial Oil & Gas Co., 103 Ark. 175, 146 Southwestern 122.

Fairbanks v. Warrum, 56 Ind. App. 37, 104 Northeastern 983, 1141.

Northwestern Oil & Nat. Gas Co. v. Ullery, 68 Ohio St. 259, 67 Northeastern 494.

LEASE OF HOMESTEAD—WIFE NOT JOINING.

The owners of certain lands entered into an agreement with oil well drillers to execute leases on their several tracts of land. The wives of the land owners did not join in the execution of the agreement. Parts of the land affected by the agreement were homesteads of the several parties and under the statute the agreement as to such land was null and void.

Haynie v. Stovall, — Tex. Civ. App. —, 212 Southwestern 792, p. 794.

MOTIVES FOR EXECUTION—DEVELOPMENT.

Owners of land because of their inability to develop their property leased the mineral rights to persons prepared and equipped to do development work. Development of the property and collection of royalties are the purposes uppermost in the minds of the lessors in the making of such leases and a lessee will not be permitted to postpone development for an unreasonable length of time or to extend the lease indefinitely by the payment of a mere nominal rent.

Ohio Valley Oil & Gas. Co. v. Irvin Development Co., — Ky. —, 212 Southwestern 110, p. 111.

See Dinsmore v. Combs, 177 Ky. 740, 198 Southwestern 58.

CONTRACT FOR LEASE—RESERVATION OF OIL AND GAS.

A person holding an enforceable contract for an oil and gas lease and for an interest in land may contract in respect thereto and may in making a settlement and adjustment of his rights enter into a contract with the grantee of the person with whom he formerly contracted and he may, in such contract, reserve to himself the oil and gas beneath the lands conveyed. The time when the drilling operations shall commence is a proper subject of agreement between the parties and in the absence of fraud and mistake the grantees will be held to their undertaking in that respect.

Kroeger v. Martin, — Okla. —, 180 Pacific 955, p. 958.

LEASE BY STATE—DRILLING IN STREAM BEDS—INJUNCTION.

The Statute of Louisiana authorizes the Governor to lease the beds of streams and lakes belonging to the State for oil and gas operations. The statute also provides that in case of dispute as to the title of stream beds the lessee shall not be enjoined from drilling but the oil and gas shall be judicially sequestrated until the title is determined. Under these statutes a lessee of the State drilling for oil and gas in a stream bed may be entitled to an injunction to prevent

a land owner, claiming title to the stream bed, from interfering through force and violence with the lessee in his operations for oil and gas in the beds of certain named streams.

Wemple v. Eastham, 144 La. —, 81 Southern 438, p. 439.

OIL LEASE BY INDIAN ALLOTTEE—FILING FOR RECORD—CONSTRUCTIVE NOTICE.

The Act of March 1, 1907 (34 Stats. 1026), provides that the filing of any lease in the office of the United States Indian Agent shall be deemed constructive notice. This provision was neither repealed, annulled, nor modified by the subsequent admission of Oklahoma into the Union, by the recordation statutes of the Territory or State, by the Enabling Act, the constitution, or the schedule to the constitution of the State. An Indian lease filed in the office of the United States Indian Agent is constructive notice to subsequent purchasers or lessees of the land.

Anchor Oil Co. v. Gray, 257 Federal 277, p. 281.

DESCRIPTION OF LAND—PAROL EVIDENCE TO EXPLAIN.

Where a latent ambiguity exists in the description of land in an oil and gas lease parol evidence is admissible to explain such ambiguity and to show that a certain fence had been agreed upon as the actual division line on the ground. Such evidence does not contradict the written lease but tends to explain its terms by giving locality and identity to the subject matter.

Dawson v. Coulter, — Pa. —, 106 Atlantic 187, p. 188.

DESCRIPTION OF LAND—NOTICE OF EXISTING LEASE.

An oil and gas lease described the land as being bounded on one side by land previously leased to a third person. Although the lease referred to had not been recorded, it was sufficient to put the lessee upon inquiry as to the terms of the former lease to ascertain the true location of a boundary line that was otherwise uncertain.

Dawson v. Coulter, — Pa. —, 106 Atlantic 187, p. 188.

LAND OMITTED BY MISTAKE—RIGHT OF LESSEE—INJUNCTION.

An oil company leased an entire tract of land in a known oil territory. By mutual mistake one acre of the tract was omitted from the lease. After the oil company began operations third persons purchased the one acre tract and immediately began drilling operations. At the suit of the oil company the purchasers of the one acre tract were temporarily restrained but on final hearing the temporary in-

junction was dissolved. The dissolution of the injunction was on the theory that injunction was not the proper remedy, for the reason that if the injunction should prove to be wrongful and the parties enjoined were rightfully entitled to proceed the extent of recovery on an injunction bond would be impossible to determine with certainty. If a well on the one acre tract should prove to be a dry hole the complaining oil company could not be damaged; but if oil should be produced the court could protect the rights of the true owners as finally established by a receivership or by some other equitable proceeding.

Texas & Pacific Coal & Oil Co. v. Howard, — Tex. Civ. App., —, 212 Southwestern 735, p. 739.

RIGHT TO EXTENSION OF LEASE—DISCOVERY OF GAS WITHIN LEASED PERIOD.

An oil and gas lease was to be operative for the period of five years and so long as gas or oil should be found in paying quantities. The lessee drilled a well and discovered gas in quantities sufficient to transport within the five-year period. After striking this gas the lessee decided to and did drill deeper and in a short time after the expiration of the lease struck gas but did not find oil or gas in the lower sand within the period prescribed by the lease. The right of extension of the lease, once vested by the discovery of gas in the upper sand was not lost by the lessee's continuance to drill deeper in search of oil or gas in the lower sand. But on failure to find oil or gas in the lower sand, the production from the upper sand could not long be deferred without incurring the penalty of abandonment or forfeiture.

Roach v. Junction Oil & Gas Co., — Okla. —, 179 Pacific 934, p. 936.

DISCOVERY OF OIL OR GAS—CONDITION FOR EXTENSION.

An oil and gas lease provided that it should be operative for a period of five years, or so long as gas, oil, or other minerals were found in paying quantities. When the lessee found gas within five-year period in quantities large enough to transport he then became vested with a limited estate in the leased premises for the purpose of transporting the gas according to the terms of the lease. The lease did not mean that the gas should in fact be transported within five years.

Roach v. Junction Oil & Gas Co., — Okla. —, 179 Pacific 934, p. 936.

TERM OF LEASE—PRODUCTION OF OIL AND GAS—EXTENSION OF LEASE.

An oil and gas lease contained a provision to the effect that it should be operative for a period of five years from date or so long

as gas, oil, or other minerals were found thereon in paying quantities. At the expiration of the term it became a condition precedent to the extension of the lessee's right to continue operations beyond the five-year period to show that oil and gas or either of them had been found upon the premises in paying quantities within five years from the date of the lease.

Roach v. Junction Oil & Gas Co., — Okla. —, 179 Pacific 934, p. 935.

PERIOD OF DURATION—EXTENSION OF TERM—RIGHTS OF LESSEE.

The fact that a well was drilled on the premises described in an oil and gas lease, but did not produce oil in paying quantities, did not exhaust the lessee's right under the lease to continue his efforts to obtain oil. This right continued to the end of the term named in the lease and if he did not, before the end of such term, produce such oil in the quantities contemplated, then his right to further explore therefor ceases. The specific term mentioned may be extended beyond the period fixed by its literal terms, but this extension of time within which the lessee may produce oil in paying quantities, so as to meet the requirements of the lease, does not depend on anything other than the proper construction of the contract. The term "as oil or gas is produced" means as long as the premises are diligently and efficiently operated, provided minerals had been discovered within the fixed term.

Ohio Fuel Oil Co. v. Greenleaf, — W. Va. —, 99 Southeastern 274, p. 278.
See *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 433, 76 Southeastern 961.

PAYMENT FOR GAS—EXTENSION OF LEASE.

An oil and gas lease provided that if gas was found in quantities large enough to transport, the lessor was to receive \$100 per year for the product of each well so transported and also free gas for his dwelling on the premises. The lease was for five years or so long as gas or oil should be found in paying quantities. Upon the discovery by the lessee of gas in quantities large enough to transport the lessor was entitled to \$100 per year for the product of each well so transported. The amount of the lessor's revenue did not depend upon the amount of gas transported, but was a fixed and definite sum, with the additional privilege of the use of gas for domestic purposes. So long as the lessor received payment of the \$100 per annum and had the use of gas for domestic purposes no other revenue or consideration from the lessee could be claimed. If the lessee failed to transport the gas and declined to pay the \$100 per annum or furnish gas for domestic purposes, then the lessor might declare a forfeiture for nonperformance.

Roach v. Junction Oil & Gas Co., — Okla. —, 179 Pacific 934, p. 936.

PERIOD OF DURATION—EXTENSION OF TERM—ESTOPPEL.

Where the lessor in an oil and gas lease that gives the lessee a specified term in which to discover oil or gas, by his conduct and by accepting the benefits thereunder, leads the lessee to believe that he will not insist upon the production of oil in paying quantities within the specified term, he will not on the expiration of such term be allowed to say that the lessee's rights are at an end, if the lessee at such time is diligently prosecuting the work of exploration in such manner as may be reasonably expected to produce oil or gas from the premises in remunerative quantities.

Ohio Fuel Oil Co. v. Greenleaf. — W. Va. —, 99 Southeastern 274, p. 279.

DISCOVERY OF MINERALS—TERMINATION OF PERIOD.

The lessee in an oil and gas lease takes upon himself enormous risks and burdens in consideration of his covenants when he drills a well upon the premises. At the time of the execution of such a lease neither party intended the general and indefinite terms employed by them to be used as instruments of extreme hardship by the operation of technical rules. The clause "operate within the specified term" is uniformly construed and applied so as to work out equitable and just results. The mere discovery of a dry hole does not end a lease under a forfeiture clause for failure to drill a well within a stipulated time. The test of duty and right are diligence and good faith in almost all cases when the terms, read in the light of the conditions and circumstances, will permit their observance.

Ohio Fuel Oil Co. v. Greenleaf. — W. Va. —, 99 Southeastern 274, p. 278.

DIVISION OF LEASED LAND—EXTENSION OF LEASE BY DRILLING WELL.

A lessor of a departmental oil and gas lease duly approved sold separate subdivisions of the leased premises to different parties after the restrictions were removed. The lessee after subdivision entered into written contracts with the different owners to the effect that the oil and gas rentals and royalties were to be deposited at different designated places. These facts did not make the lease a separate lease upon each of the subdivided tracts of land, but it remained a lease upon the entire tract and the drilling of a well upon any portion thereof and the payment of the royalty on any oil and gas produced as provided in the lease to the owner of the portion of the land where the well was drilled extended the life of the lease upon the entire tract of land although subdivided.

Pierce Oil Corp. v. Schacht, — Okla. —, 181 Pacific 731, p. 733.

FAILURE TO DEVELOP—RIGHT OF LESSOR.

Full protection may be accorded the lessor of an oil and gas lease with respect to the enforcement of the implied covenant of the lessee to use due diligence in mineral development without making a breach of the covenant a ground of forfeiture. The lessee can not abandon his contract without subjecting it to cancellation on that ground, and the power of a court of equity in decreeing specific performance is far reaching and such power has been exercised in proper cases to compel either performance or abandonment by a lessee of an oil lease. Where the lessee removed his drilling machinery from the land and for nine years conducted no prospecting or drilling or producing operations his rights were lost by abandonment.

Grubb v. McAfee, — Tex. Civ. App. —, 212 Southwestern 464, p. 467.

See Kleppner v. Lemon, 198 Pa. 591, 48 Atlantic 483.

Conkling v. Krandusky, 127 App. Div. 9, 112 N. Y. Supp. 13.

FAILURE TO DEVELOP—IMPLIED COVENANT—REMEDY FOR BREACH.

An implied covenant may exist to reasonably operate the premises, but there is no implied or express covenant on the part of the lessee to leave the premises and forfeit his lease for a breach of such implied covenant. A lease provided for a forfeiture for the failure to comply with its conditions or to pay the cash consideration according to the agreement, but a breach of the implied covenant to reasonably operate the premises was not included in the causes of forfeiture. Where some causes of forfeiture are expressly mentioned none others can be implied. The remedy for a breach of the implied covenant to reasonably operate the premises is therefore not by way of forfeiture of the lease, but must be sought in a proper action for a breach of the covenant.

Grubb v. McAfee, — Tex. Civ. App. —, 212 Southwestern 464, p. 466.

See Harris v. Ohio Oil Co., 47 Ohio St. 131, 48 Northeastern 506.

Poe v. Ulrey, 233 Ill. 65, 84 Northeastern 50.

FAILURE TO DRILL—ANNUAL RENTAL—RECOVERY FOR FIRST YEAR.

An oil lease provided that it should continue for a period of ten years and as long thereafter as oil or gas was produced and if drilling was not begun within one year, the lease should terminate unless the lessee should elect to continue it in force by paying an annual rental of \$35. The unambiguous terms of the lease contemplated the right upon the part of the lessee at the end of the first year to continue the lease upon the payment in advance of the annual rental provided. The lessee at the end of the first year paid the sum of \$35

and thus continued his rights for another year. Under the lease the lessor was not entitled to recover the annual rental for the first year.

Sullivent v. Clear Creek Oil & Gas Co., — Ark. —, 211 Southwestern 173, p. 174.

TIME FOR DRILLING—TERMINATION OF CONTRACT—TENDER TO BANK.

An oil and gas lease provided that it should terminate if the lessee should fail to begin operations for a well on or before a stated date, unless the lessee should before that date pay or tender to the lessor or to the credit of the lessor in a certain stated bank a stated sum. Under the lease the bank stood in the place of the lessor and was to receive for him the money to be paid by the lessee and when the check or draft or money was paid or tendered to the bank, the lessee could exercise no further ownership or control over it and it then belonged to the lessor. It was paid to and received by the bank for the lessor. Under the lease the bank was the sole agent of the lessor.

Texas Co. v. Wimberly, — Tex. Civ. App. —, 213 Southwestern 286, p. 289.
See *Beatty Oil Co. v. Blanton*, 245 Federal 979.

Lafayette Gas Co. v. Kelsay, 164 Iowa 569, 74 Northeastern 9.
Friend v. Mallory, 52 W. Va. 53, 43 Southwestern 114.

AGREEMENT TO DRILL WITHIN A YEAR—RIGHTS WHERE WELL WAS DRILLED.

An oil and gas lease given for a cash consideration was for a term of five years, and on the further condition that the lessee was to complete a well within one year or pay a certain rental per acre per annum until the well was completed. A well was drilled within the year according to the terms of the lease, and the contractual consideration for drilling having been fully performed, the lessee was under no obligation to drill another well in order to hold the lease for the full five-year period.

Key v. Big Sandy Oil & Gas Development Co., — Tex. Civ. App. —, 212 Southwestern 300, p. 301.

NUMBER OF WELLS NOT SPECIFIED—IMPLIED OBLIGATION.

In the absence of an express covenant when the lessee undertook to develop oil or gas lands on a rental or royalty basis and the contract did not specify the number of wells, there was an implied obligation that the lessee would fully develop the land with reasonable diligence.

Grubb v. McAfee, — Tex. Civ. App. —, 212 Southwestern 464, p. 465.
See *Rice v. Black*, 26 Iowa 356, 26 Northwestern 1056.

Brewster v. Lanyon Zinc Co., 140 Federal 801.

AGREEMENT TO COMPLETE WELL—MEANING.

An oil and gas lease provided that the lessee was to complete a well on the premises within one year or pay a certain specified rental. The lessee assigned the lease to an oil-drilling company and the assignee drilled a well to the depth of 2,000 feet. The discovery of oil had been expected at a depth of 1,700 or 1,800 feet, and on reaching the depth of 2,000 feet, the lessor agreed with the lessee that the well was completed within the meaning of the terms and conditions of the lease. If the agreement in the lease to "complete the well" was ambiguous, the subsequent consent and agreement of the lessor that the well drilled to a depth of 2,000 feet was a complete well within the meaning of the lease was binding upon the lessor.

Key v. Big Sandy Oil & Gas Development Co., — Tex. Civ. App. —, 212 Southwestern 300, p. 301.

DISCOVERY OF OIL—VESTED RIGHT—ABANDONMENT.

The discovery of oil or gas under a lease giving the right of exploration and production is sufficient to create a vested estate in the lessee in the exclusive right to produce oil or gas, but this right may be lost by abandonment, by failure to produce oil or gas, or pursue the work of production or development of the property.

Ohio Fuel Oil Co. v. Greenleaf, — W. Va. —, 99 Southeastern 274, p. 278. See Eastern Oil Co. v. Coulehan, 65 W. Va. 531, 64 Southeastern 836.

LEASE BY WIFE—DEATH OF LESSOR—HUSBAND AS LIFE TENANT.

An antenuptial agreement by which after the marriage the wife should hold and enjoy her separate estate does not cut the surviving husband out of his curtesy or his inheritance and does not deprive him or his legal heirs from their right to moneys received as royalties on oil for well drilled under a contract with and in the lifetime of the wife.

Bramer v. Bramer, — W. Va. —, 99 Southeastern 329, p. 332.

DEATH OF LESSOR—RIGHT OF LIFE TENANT—OPEN MINES.

The lessee in an oil and gas lease after the death of the lessor entered upon the leased premises and drilled and produced oil and gas. Oil and gas wells so drilled are regarded as open mines at the time of the lessor's death and the life tenant will be entitled to the rents, issues, and profits reserved to the lessor accruing from such wells during the life tenancy.

Bramer v. Bramer, — W. Va. —, 99 Southeastern 329, p. 330.

COMMISSION FOR PROCURING LEASE—RECOVERY.

In an action by a broker to recover commissions under a verbal contract made at a specific date by which he was to receive a stated amount for commission, after having effected an oil lease of the real estate of the defendant, the broker after alleging a certain contract can not recover on proof of a contract different in character and made at another time. The fact that a landowner employed a broker to obtain a lease for him did not prevent the landowner himself from making a lease of his land.

Dickinson v. Robinson, 145 La. —, 82 Southern 398, p. 399.

PARTNERS BUYING AND SELLING LEASES—COMPLIANCE WITH STATUTE—
VALIDITY OF CONTRACT.

Persons engaged as partners under a fictitious name in the business of buying and selling leases are prohibited from doing business without filing a certificate in the office of the county clerk. An oil and gas lease executed or assigned by a firm that failed to comply with the statute is unenforceable by the partnership, but such a contract is not void. The other party to such a lease or assignment may at his option enforce specific performance against the partnership or have a cancellation of the lease on proper proof.

Warren Oil & Gas Co. v. Gardner, — Ky. —, 212 Southwestern 456, p. 458.

ASSIGNMENT—MODIFICATION OF CONTRACT—CONSIDERATION.

The owner of oil leases assigned certain shares of stock and his interest in other oil leases in consideration of an agreement on the part of an assignee of the first leases to drill a test well. Subsequently the assignee sold an interest in the tract and the purchaser assumed the obligation of drilling the test well. The purchaser of the interest from the assignee commenced the work of drilling but refused to continue drilling operations and complete the well. Thereupon the contract to drill was modified and the original owner of the oil leases was permitted to drill a well and by agreement was to use the equipment furnished by the purchaser from the assignee of an interest in the leases. This agreement by which the owner was to drill the well was not without consideration but the contract and the arrangement by which the purchaser of the interest from the assignee was to drill the well constituted a sufficient consideration for the subsequently modified contract and under these facts the owner of the leases was entitled to an injunction to restrain the purchaser of the interest of the assignee from removing the oil drilling equipment from the premises and from the possession of the owner of the

leases under the contract by which permission was given the latter to use the well drilling equipment.

Hinton v. D'Yarmett, — Tex. Civ. App. —, 212 Southwestern 518, p. 522.

ASSIGNMENT OF LEASE—RESCISSION—DILIGENCE.

The lessors in an oil and gas lease can not have a decree rescinding the assignment of the lease where they failed to offer to rescind promptly upon discovering the facts on which they based their claim to a rescission and failed to give any reason for any rescission promptly and where they did not offer to restore what they had received under the contract.

Duncan v. Keechi Oil & Gas Co., — Okla. —, 181 Pacific 709, p. 711.

ASSIGNMENT OF MONEY RENTALS—REGISTRATION.

A mining lease of certain lands was given in consideration of the payment of a certain sum in cash with the right of renewal by paying in advance each year a like amount of rental. The lease was duly recorded as required by the statute. Subsequently the lessors for a valuable consideration assigned and conveyed to a certain named bank all their right, title, interest and claim to the annual rentals, royalties, and benefits due them under the terms of the lease and authorized the cashier of the bank to collect and receipt for the same and guaranteed the payment of the annual rentals, but this assignment was not recorded. The assignment of the definite and specific amount to become due at the time fixed in the lease was a complete disposition of the rentals so far as the lessors were concerned. The assignment of the money rentals was not subject to the registration laws nor the law merchant. It was not a deed, conveyance, or instrument, concerning lands or tenements within the meaning of the registration statute but was personal property, a negotiable chose in action.

Farmers' & Merchants' State Bank v. Tullos, — Tex. Civ. App. —, 211 Southwestern 847, p. 848.

ALTERATIONS BY LESSEE—RIGHTS OF LESSOR.

An oil and gas lease was executed in duplicate, each party retaining his copy as an original. The duplicates as executed provided for a yearly rental of \$240 payable quarterly in advance, pursuant to an agreement to pay the lessor at the rate of \$1.50 per acre for the 160 acres included in the lease. The lessee without authority from the lessor changed his duplicate from \$1.50 to \$1, making the annual rental \$160 and the quarterly payment \$40 instead of \$60.

After the alterations had been made the lessee sold and assigned the lease to an oil company that had no knowledge of the alteration. Within the time stipulated the assignee paid the lessor the quarterly payment of \$40. The lessor accepted the \$40 and signed a receipt reciting that that sum was in full for the quarter and extended the life of the lease for three months. The lessor received the \$40 quarterly payments for a year without objection, but when reminded, or upon examination, discovered that the original lease called for \$1.50 per acre or \$60 per quarter, refused to accept the amount. The assignee of the lease thereupon offered to pay the \$60 per quarter, but the lessor refused this payment on the ground that the alteration by the original lessee rendered the lease void. The alteration made by the lessee in his duplicate could not affect the rights of the lessor; but the acceptance of the \$40 quarterly payments by the lessor for a year without objection and with some information as to the alteration of the lease and the reason why it had been made were sufficient to estop the lessor from demanding the full quarterly payment of \$60 or declaring the lease void.

Magnolia Petroleum Co. v. Saylor, — Okla. —, 180 Pacific 861, p. 864.

SALE—FRAUDULENT REPRESENTATION—AVOIDANCE.

Each of four persons owned an undivided one-fourth interest in an oil and gas lease on a certain tract of land. An oil company in drilling a well on a near-by tract discovered oil that greatly enhanced the value of the lease in question. Two of the joint owners of the lease, with knowledge that oil had been discovered in the well drilled, purchased the interest of the other two joint owners, who at the time had no knowledge of the discovery of oil. The purchasers concealed the fact that oil had been discovered and told them that the well in process of drilling was likely to be a dry hole, but that the entire lease could be sold as a unit at the price they were offering. The price paid for the part interest was a little more than one-tenth of what the purchasers a few days later received for the sale of part of the lease. In the purchase of the interest in the lease there was no positive misrepresentation of a material fact, but the statement in reference to the well was made in the form of the expression of an opinion, and where an opinion was expressed for the purpose of deceiving as to a matter which was within the knowledge of the person expressing it, it ceased to be a matter of opinion and was thereby made the means of a misrepresentation or concealment of a fact and may form the predicate for actionable fraud.

Zundelowitz v. Waggoner, — Tex. Civ. App. —, 211 Southwestern 598, p. 599.

FRAUD—CANCELLATION—JURISDICTION OF COUNTY COURT.

An oil company filed its petition in a county court asking an order requiring a guardian to repay to the oil company a \$1,600 bonus paid by it for oil leases upon the lands of the minors represented by the guardian on the ground that the guardian secured the approval of the oil leases by fraudulent representation. Jurisdiction to cancel orders and judgments of the county court fraudulently obtained is possessed by the district superior courts and a county court has no jurisdiction to cancel and set aside any such order or judgment.

Johnson, *In re* (Twin State Oil Co. v. Johnson), — Okla. —, 179 Pacific 605, p. 607.

CANCELLATION AND RESCISSION—DUTY OF LESSOR—DILIGENCE.

A lessor of an oil and gas lease invoking the jurisdiction of a court of equity to cancel and rescind the lease for the breach of an implied covenant must come into court with "clean hands," and he must act with reasonable diligence after the discovery of his right to a forfeiture of the lease on account of its breach.

Pierce Oil Corp. v. Schacht, — Okla. —, 181 Pacific 731, p. 734.

See *Indiana Oil, Gas & Development Co. v. McCrory*, 42 Okla. 146, 140 Pacific 610.

Wellsville Oil Co. v. Miller, 44 Okla. 493, 145 Pacific 344.

Michigan Pipe Line Co., In re, 111 Federal 284.

CANCELLATION—PROOF INSUFFICIENT.

The owners of certain oil and gas leases assigned the same to third persons in consideration that the assignee develop the leases and drill a test well. The leases provided that if a test well was not begun in 30 days the assignors were to receive \$500 liquidated damages. With the knowledge and consent of the assignors, the assignee assigned his interest in the leases to an oil drilling company that undertook to perform the conditions of the leases. An action by the assignors to cancel the assignment of the lease could not be maintained where it appeared that no false representations were made as to the ability of the assignee to drill the test well and no proof was shown that the assignee or the second assignee had in fact breached the contract but where it was shown that the assignors made no objections as to the time the drilling operations were commenced and where the proof showed that oil was found in paying quantities.

Duncan v. Keechi Oil & Gas Co., — Okla. —, 181 Pacific 709, p. 710.

CONTRACT FOR OIL LEASE—SUIT TO CANCEL.

The owners of certain lands entered into an agreement with oil-well drillers to the effect that the land owners would execute leases as of the printed form attached to the agreement giving to the first parties the right to drill for oil upon their lands. As a part of the consideration for the contract the well drillers were to attempt to secure the release of an existing lease upon the lands of the several owners and the new leases were to be executed within five days of the final securing of the release of the existing lease. After the execution of the agreement the well drillers secured the release of the existing lease. The land owners were not entitled to a cancellation of the contract on the ground that the well drillers had failed to comply with the terms of the written agreement and on the ground that the contract became executed under the rule that equity regards as done that which ought to be done although new leases were not formally executed.

Haynie v. Stovall, — Tex. Civ. App. —, 212 Southwestern 792, p. 794.

ABANDONMENT—INTENTION.

Whether an oil and gas lease had been terminated by abandonment on the part of the lessee and the acceptance of or reentry upon the premises by the lessor is a question of intention. A lease so terminated is said to have come to its end by operation of law, the legal result arising from the acts of the parties. The intention on the part of the lessee to abandon and on the part of the lessor to resume possession of the premises on his own account and treat the lease as having been surrendered and as ascertained from their acts and conduct is the test.

Grubb v. McAfee, — Tex. Civ. App. —, 212 Southwestern 464, p. 468.

ABANDONMENT—RIGHT TO FORFEITURE.

A lessee drilled a well on the premises within the time required and discovered oil at a depth of 250 feet. The well produced oil for some 60 days and then failed entirely. The lessee drilled two other wells, but found no oil, and thereupon removed all machinery, equipment, and supplies from the land and for 9 years had conducted no drilling or producing operations. Under these facts the lessor was entitled to a judgment forfeiting the lease on the ground of abandonment.

Grubb v. McAfee, — Tex. Civ. App. —, 212 Southwestern 464, p. 465.

CONTRACT TO DRILL—ABANDONMENT—RIGHTS AND LIABILITIES.

An oil-well driller agreed with an oil company to pull the pipe from a certain well and to clean it out for the sum of \$1,000, but

nothing was to be paid if the driller did not put the well in good shape for pumping. The oil company was to furnish the necessary tools and supplies with which to work. The oil company failed to furnish the tools and supplies as required by the agreement but did advance to the driller the sum of \$395 with which to purchase tools and supplies. The driller abandoned the contract and the well because of the failure of the oil company to furnish the tools and supplies according to the contract. An assignee of the oil company was not entitled to recover the money advanced where the damages of the driller caused by the failure of the oil company to furnish the tools and supplies exceeded the amount advanced by the oil company.

Hoppes v. Williams, — Tex. Civ. App. —, 213 Southwestern 328, p. 329.

FAILURE TO DEVELOP—FORFEITURE—NOTICE TO LESSEE.

The right of a lessor to forfeit an oil and gas lease for non-development can not be arbitrarily exercised. He must first notify the lessee that he will no longer accept the annual rentals and permit the land to remain undeveloped, but he must demand of the lessee that he execute the lease according to the intention and demand that he develop in good faith the leased lands. If the lessee, after such notice and demand, fails to begin the development within a reasonable time the lessor may then have the lease forfeited.

Ohio Valley Oil & Gas Co. v. Irvin Development Co., — Ky. —, 212 Southwestern 110, p. 111.

See Warren Oil & Gas Co. v. Gilliam, 182 Ky. 807, 207 Southwestern 698.

See Monarch Oil & Gas Co. v. Richardson, 124 Ky. 602, 99 Southwestern 668.

FORFEITURE—NOTICE OF CONDITIONS.

An oil and gas lease provided that the lessor might declare the lease forfeited upon giving 10 days' notice, but the provision was not complied with by the lessor merely notifying the lessee that he had declared the lease forfeited. In order to comply with such a provision in a lease it is necessary for the lessor to notify the lessee of the terms of the lease that have been violated and to demand that if the same were not complied with within 10 days then the lease would be declared forfeited.

Pierce Oil Corp. v. Schacht, — Okla. —, 181 Pacific 731, p. 734.

FAILURE TO DRILL—FORFEITURE.

An oil and gas lease for a term of 20 years required the lessee to begin a well within 30 days and to continue to drill until oil was found in paying quantities or until a depth of 300 feet was reached. The lease also provided that a failure "to drill said well as above provided shall render this instrument of writing null and void as

to all parties hereto." The lessee did begin to drill within 30 days and prosecuted the work with diligence until oil was found at the depth of 250 feet, and the well produced oil for some 60 days when it ceased to produce. The lessee sunk two other wells within 12 months without finding oil, and thereupon removed his machinery, equipment, and supplies, and for nine years conducted no prospecting or drilling upon the land. The lease specified as the sole cause of forfeiture the failure to drill the first well within the time or to the depth specified. The law implied an obligation on the lessee to exercise reasonable diligence to continue drilling and mining operations on the land after oil was encountered in the first well, but the lease did not make this obligation a condition subsequent and authorize a forfeiture for noncompliance with that obligation.

Grubb v. McAfee, — Tex. Civ. App. —, 212 Southwestern 464, p. 465.

FORFEITURE—CONTROVERSY AS TO TERMS—FAILURE TO GIVE NOTICE.

The lessor in an oil and gas lease claimed the right to forfeit the lease because of the failure to pay the delay rentals and advance royalties in the sum of \$52 due and payable June 19, 1910. In September, 1910, the lessor permitted the lessee to enter upon the premises and drill a gas well and permitted the lessee to pay for a period of three years the royalties due under the lease to the owner to whom that part of the leased premises had been conveyed. Thereafter the lessee took possession of the portion of the premises still belonging to the lessor over his protest but without any proceedings and drilled three producing oil wells thereon at a large cost and thereupon tendered to the lessor the royalties due him under the lease. Under such circumstances a court of equity would not enforce a forfeiture for the failure to pay the \$52 rental, and particularly so where there was a controversy as to whether or not the rental was due and where no notice was given by the lessor before attempting to declare a forfeiture.

Pierce Oil Corp. v. Schacht, — Okla. —, 181 Pacific 731, p. 734.

RIGHT TO FORFEITURE—ACCEPTANCE OF RENTS—WAIVER.

A lessor in an oil and gas lease, after cause of forfeiture has accrued, who fails to signify to the lessee his intention in some unequivocal manner to avoid the lease and thereafter accepts rentals in lieu of development waives his right to declare the forfeiture.

Maud Oil & Gas Co. v. Bodkin, — Okla. —, 180 Pacific 959, p. 960.

FORFEITURE—JUDGMENT PROCURED BY FRAUD—RELIEF.

A coal mining lease provided that the lessee was to pay a royalty of eight and one-third cents per ton and was to mine sufficient coal

to insure to the lessors an income of not less than \$50 a month. Operations were to begin as soon as possible after the lease was executed. After mining operations had been conducted for some time by an assignee of the lease, suit was brought by the lessors to cancel the lease and to recover royalties due. One of the lessors representing the plaintiffs in the action falsely and fraudulently represented to the president of the mining company, the defendant in the action, that if the company would not appear and permit a judgment by default forfeiting the lease that the lessors would thereupon execute a new lease to the mining company on the same terms as the existing lease. Relying upon the representations the mining company permitted the judgment by default forfeiting the lease but the lessor refused thereafter to execute a new lease to the mining company. Upon proof of these facts and a showing that the mining company had a good defense to the original action the company was entitled to have the default judgment set aside and to be permitted to defend the action.

Krypton Coal Co. v. Eversole, — Ky. —, 212 Southwestern 421.

FORFEITURE—ACCEPTING BENEFITS—ESTOPPEL.

A lessor in an oil and gas lease can not claim a forfeiture where he has so conducted himself as to lead the lessee to believe that a claim of forfeiture would not be made for a failure to produce oil or gas in paying quantities within the specified term mentioned in the lease.

Ohio Fuel Oil Co. v. Greenleaf, — W. Va. —, 99 Southeastern 274, p. 280.

QUIETING TITLE—EQUITY JURISDICTION.

Equity has jurisdiction at the suit of the holder of a valid oil and gas lease, whose rights have become vested by the discovery of oil or gas to remove as a cloud upon his rights a subsequent lease executed to a stranger by the lessor covering the same tract of land.

Ohio Fuel Oil Co. v. Greenleaf, — W. Va. —, 99 Southeastern 274, p. 276.
See Carbon Black Co. v. Ferrell, 76 W. Va. 300, 85 Southeastern 544.

CONFLICTING RIGHTS—EQUITABLE JURISDICTION.

Equity is the proper forum to adjudicate all issues arising between claimants under conflicting oil and gas leases executed by the same lessor on the same tract of land.

Ohio Fuel Oil Co. v. Greenleaf, — W. Va. —, 99 Southeastern 274, p. 277.

MINING PROPERTIES.

TAXATION.

PHOSPHATE LANDS—BASIS OF VALUATION.

When an assessor has not sufficient knowledge or information of the real value of a mineral deposit upon which to base a fair and equitable valuation he should assess the land upon some basis of known value obtainable as required by law.

Camp Phosphate Co. v. Allen, — Fla. —, 81 Southern 503, p. 510.

PHOSPHATE LANDS—METHOD OF ASCERTAINING VALUE.

Valuations of phosphate lands for taxation must have a just relation to the real and known value of the property assessed and not to some unknown and speculative value and there must be no substantial inequality in valuations in the various kinds and items of property that are subject to tax. The statute of Florida does not require an assessor to prospect land to ascertain if it contains valuable mineral deposits; nor does it compel the owner to expend a large sum prospecting his land for the information of a tax assessor. If an assessor by the exercise of a small degree of interest might not have found it necessary to assess large tracts of land known to him to be nonmineral at an excessive fictitious value in order to assess a deposit of phosphate which by some unknown means he estimated to contain 2,000 tons, when it was a matter of common knowledge where phosphate mining had been carried on that a deposit of less than 10,000 or 15,000 tons of phosphate is of no value for mining purposes and adds no value to the land. Under such conditions a court of equity may properly interfere to restrain the collection of such a tax.

Camp Phosphate Co. v. Allen, — Fla. —, 81 Southern 503, p. 510.

ASSESSMENT OF PROPERTY—ERRORS OF JUDGMENT.

Mere errors of judgment by taxing officers in the assessment of phosphate lands will not support a claim of discrimination; but there must be something which in effect amounts to an intentional violation of the essential principles of practical uniformity. The good faith of taxing officers and the validity of their actions are presumed and when these are assailed the burden of proof is upon the complaining party.

Camp Phosphate Co. v. Allen, — Fla. —, 81 Southern 503, p. 507.

ASSESSMENT OF SMELTER—JURISDICTION OF COURT TO GIVE RELIEF.

A taxpayer was dissatisfied with the amount of his assessment as fixed by the State tax commissioners and the board of equalization on his mills and smelters for the reduction of ore. In a suit by the taxpayer the court decreed that the taxes levied by the tax commissioners were excessive and that the assessment should be fixed in the sum of \$2,000,000. Under the statute the court was without jurisdiction as the matter was wholly within the province of the State tax commission's duty.

State v. International Smelting Co., — Ariz. —, 181 Pacific 951.

State v. Inspiration Consol. Copper Co., — Ariz. —, 181 Pacific 955.

APPEAL FROM ASSESSMENT—JURISDICTION OF COURT.

The valuation for assessment of certain mining property was changed by the State tax commissioner from the value fixed by the taxing officers of the county. The mine owner paid the taxes under protest and gave notice of appeal by filing the notice in the office of the clerk of the board of supervisors. The protest was addressed to the county treasurer, the tax collector. When a property owner has invoked the procedure authorized in paragraph 4887 (R. S. A. 1913), and proceeded to a final judgment in the superior court no appeal is provided for to the supreme court. The protest with the notice and receipt of payment of the taxes accompanying the protest filed in the superior court is the complaint paragraph 390 requires to be filed in order to commence a civil suit in the superior court for contesting and determining the full cash value of taxable property when the value placed thereon by the county authorities is not satisfactory to the taxpayer. The determination reached in such proceeding is equivalent to a final judgment and under the statute an appeal lies from such determination. The taxpayer's ground for protest is his ground for action and the rights asserted by his protest filed have never been determined by any board, officer, tribunal or court and the matter is not before the board for the purpose of review of any prior determination, but is there for the purpose of an original inquiry into and determination of the right of the taxpayer as set forth in his protest.

State v. Inspiration Consol. Copper Co., — Ariz. —, 181 Pacific 955, p. 957.

ASSESSMENT OF FOREIGN OIL COMPANY—AUTHORITY OF TAXING OFFICERS.

The State Tax Commission of Arizona has supervision of the system of taxation and over the administration of the assessment of taxes and may assess property, franchises, and all intangible values

of public service corporations. The State Board of Equalization has authority to equalize the assessments and values of property throughout the State and fixes the rate of taxation for State purposes and all property is required to be taxed at its full cash value. But there is no statutory authority in Arizona for the taxation of the earnings of the Standard Oil Company, a foreign corporation, nor is there any provision which authorizes the taxing officers to judge what earnings are excessive or as to how heavily such earnings may be taxed. The State Board of Equalization has no power to determine the "excessive earnings" of a foreign corporation or its "intangible" property, not included in the term "real estate." The Board of Equalization is not authorized to make a valuation on what is known as the "capitalized income plan" and the board can not increase the valuation of the property of such a corporation on that part of the capitalized income and above the value of the tangible property on the theory that it resolves itself into a simple assessment of intangible property.

Standard Oil Co. v. Howe, 257 Federal 481, p. 485.

FOREIGN CORPORATION—ASSESSMENT OF INTANGIBLE PROPERTY.

The Standard Oil Company of California owned within that State, pipe lines, refineries, oil wells, and property valued at more than \$40,000,000. The company sold its products in other States and in the conduct of its business owned in the State of Arizona tangible property valued at more than \$300,000. The Arizona Board of Equalization determined that the oil company's profits on its Arizona sales for the year were over \$727,000 and proceeded to capitalize these earnings at 25 per cent and thereby arrived at a total value of \$2,900,000. From this sum the board deducted the cash value of the tangible property in the State and fixed the taxable property of the corporation at the difference between these sums. This sum was divided among the counties in proportion to their several contributions to the corporation's gross sales without reference to the actual value of the properties involved and the counties were directed to enter upon their assessment rolls: "Tangible and intangible valuation on property above enumerated based on excessive earnings." In the matter of the assessment the State board considered not merely the earnings and income produced by the oil company in Arizona but in far greater part took into consideration the earnings and income produced by the property of the oil company in California. The income as considered included the oil company's entire profits upon all crude petroleum produced by it and sold in Arizona, as well as the whole profit upon the oil company's manu-

facture and sale of manufactured products distributed in that State. The valuation of the property as determined by the Board of Equalization was unauthorized and the assessment of taxes illegal.

Standard Oil Co. v. Howe, 257 Federal 481, p. 485.

ILLEGAL ASSESSMENT—RIGHT TO INJUNCTION.

The statute of Arizona (sec. 4887, R. S. 1913) gives a taxpayer dissatisfied with the amount of his assessment the right to appeal to the superior court of the county and prescribes the procedure. Section 4939 of the same statute expressly provides that no injunction shall ever issue to prevent or enjoin the collection of any tax but provides that the taxpayer may recover any tax illegally collected in the manner pointed out by the statute. A Federal court in the exercise of its equitable jurisdiction is not bound by this section of the Arizona statute which forbids injunctions against the taxing officer to prevent the collection of a tax where it appears that the action of the State Board of Equalization was fundamentally erroneous in principle and the assessment was unwarranted by law; but a Federal court will give injunctive relief where the remedy under the statute would involve a multiplicity of suits upon a question of law common to all and where a single action at law would not suffice.

Standard Oil Co. v. Howe, 257 Federal 481, p. 487.

TANK CARS—OWNERSHIP AND OPERATION—TAXATION.

The statute of Florida (Compiled Laws 1914, sec. 596a), imposes a license tax upon any corporation owning, controlling, or operating tank cars. This act can apply only to corporations engaged in the business of owning, controlling, or operating such cars; and a corporation engaged in producing, buying and selling oils and oil products that owns and uses tank cars for the sole purpose of transporting its own products by reason of the failure of the railroad company to provide such cars is not engaged in the business of owning tank cars.

Texas Co. v. Ames, — Fla. —, 81 Southern 471.

MINERS' LIENS.

NATURE OF WORK.

The work for which a lien on a mine or mining property is given is that which is performed in the development and conservation of the mine and the results of which become incorporated with the mine so as to constitute a part of its value.

International Trust Co. v. Lowe, — Colo. —, 180 Pacific 579, p. 580.

PERSONS ENTITLED TO LIEN—GENERAL MANAGER.

A general manager of a mining company stands very much in the position of an owner directing and managing his own business. He is the representative of the corporation, and to the laborers under him he is practically the corporation itself. Such a manager does not come within the spirit of the mechanics' lien acts and he is not entitled to a lien on the mine or mining property for services rendered, as against bondholders, where as such general manager, he aided in the issue of the bonds.

International Trust Co. v. Lowe, — Colo. —, 180 Pacific 579, p. 580.

MINING SUPERINTENDENT—RIGHT TO LIEN.

Section 4 makes the provisions of the Colorado statute applicable to all persons who shall do work or shall furnish materials as provided in section 1. Section 1 gives a lien to engineers who have furnished "surveys or superintendence," or "who have rendered other professional or skilled services." Under these two sections a mining superintendent may acquire a lien on a mine whose working he has superintended.

International Trust Co. v. Lowe, — Colo. —, 180 Pacific 579, p. 580.

TIME LIENS ACCRUE—RELATION.

Section 6 of the lien act of 1899 makes all liens relate back to the commencement of the work; but the furnishing of material is not mentioned. The general provision is that "all liens established by virtue of this act shall relate back" and this broad and inclusive language must prevail as against a special limitation from the use of the word "work." The statute refers to the commencement of the work, the beginning of operations under the contract, and not to the labor of some mechanic or laborer.

International Trust Co. v. Clark Hardware Co., — Colo. —, 180 Pacific 300.

SEPARATE ITEMS—SINGLE TRANSACTION.

Where all the items in an account for a miner's lien relate to one transaction, it constitutes a continuous transaction within the meaning of the Colorado lien law.

International Trust Co. v. Clark Hardware Co., — Colo. —, 180 Pacific 300.

See Fields v. Daisy Gold Mine Co., 25 Utah 7, 69 Pacific 528.

CONTRACT FOR SUPPLIES—MONTHLY PAYMENT—RUNNING ACCOUNT.

The manager of a mining company made an agreement with a hardware company for such mining supplies as should be needed in the operations of the mining company and payments therefor were to be made monthly. Such an agreement justifies a finding that there was an arrangement for a running account within the meaning of the Colorado lien law.

International Trust Co. v. Clark Hardware Co., — Colo. —, 180 Pacific 300.

TRESPASS.

JOINT ACTION BY TENANTS IN COMMON.

Tenants in common of mining property must joint in actions ex delicto for an injury to their common property. A cause of action for nonpayment of rent, breach of covenant for good mining, and removal of the property of the lessors is in the tenants jointly and their remedy is joint.

Himes v. Schmehl, 257 Federal 69, p. 71.

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QUARRY OPERATIONS.

FAILURE TO FURNISH MEDICAL AID.

It is the duty of a quarry operator in an emergency created by an accident to render to an injured employee such immediate first aid, as well as prompt medical and surgical attention, as was reasonably possible under all the circumstances. Failing in this the quarry company was guilty of negligence in not using active diligence.

Hunicke v. Meramec Quarry Co., — Mo. —, 212 Southwestern 345.

See Hunicke v. Meramec Quarry Co., 262 Mo. 560, 172 Southwestern 43.

NEGLIGENCE OF OPERATOR—HORSES FRIGHTENED BY BLAST.

It was actionable negligence for a quarry operator to fire blasts in a quarry without warning in such manner as to frighten a team of horses properly driven into the quarry and to cause them to run away. Under these circumstances the quarry company was liable for injuries to the driver received while he was attempting to prevent the team from running away.

Slinkard v. Lamb Construction Co., — Mo. App. —, 212 Southwestern 61, p. 64.

NEGLIGENCE OF FOREMAN—LIABILITY OF OPERATOR.

A granite quarry operator assumed the duty of determining the stability of the pieces of granite in his quarry upon which he directed his employees to work. Having assumed this duty the operator is liable at common law for its negligent performance by his foreman, to whom he had entrusted it, and an employee would not be at fault for failing to ascertain whether the operator had performed this duty.

Tierney v. New England Granite Works, — New Hampshire —, 106 Atlantic 481, p. 842.

EMPLOYEE OBEYING INSTRUCTIONS—KNOWLEDGE OF DANGER—RECOVERY.

An employee in a quarry was injured while inserting with his hands a wedge beneath a stone in obedience to the directions of the foreman. The injury occurred in Pennsylvania and the statute of that State expressly provides that where a servant in obedience to the requirement of the master incurs a risk which though dangerous

is not so much so as to threaten immediate danger or where it is reasonably probable it may be safely done by extraordinary caution or skill, the master is liable for the resulting injury. Under this statute, where an employer gives an employee to understand that he does not consider a particular act one which a prudent person should refuse to undertake, the employee has a right to rely upon his master's judgment unless his own is so clearly opposed thereto that in fact he does not rely upon his employer's opinion. A servant is not called upon to set up his own judgment against that of his superiors, and he may rely upon their advice and still more upon their orders notwithstanding any misgivings of his own. The employee's dependent and inferior position is to be taken into consideration; and if the employer gives him positive orders to go on with the work under perilous circumstances the employee may recover for an injury thus incurred if the work was not inevitably and imminently dangerous.

Fillippon v. Albion Vein Slate Co., 39 Supreme Ct. Rep. 435, p. 437.

CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.

An experienced quarryman was directed by the foreman to prepare a piece of granite for the attachment of chains so that it could be removed by a derrick. It was the foreman's duty to see that the stone was on a secure foundation before directing the workman to split off a piece because of a seam. The workman did split off a piece and was injured while preparing the remainder for removal by the derrick. The work of continuing the preparation of the work after the part was split off was within the contemplation of the foreman when he directed the stone to be split. Whether the foreman was at fault in not ascertaining that the stone was securely placed for all the work necessary to be done and whether or not the workman was guilty of contributory negligence in continuing the work upon the stone were questions of fact to be determined by the jury.

Tierney v. New England Granite Works, — New Hampshire —, 106 Atlantic 481, p. 482.

ACTION FOR PERSONAL INJURY—INSTRUCTIONS IN ABSENCE OF PARTIES.

An employee in a stone quarry known as a rubbish hand brought an action to recover for injuries caused by the fall of a stone while he was pushing a wedge under the stone in the presence of and under the express direction of the foreman. After the evidence was heard and the instructions given the jury retired for deliberation, and later the jury submitted to the judge a query as to whether or not the

plaintiff was guilty of contributory negligence in pushing the wedge under the stone. The judge in answer to the inquiry, and in the absence of the parties and their attorneys, sent to the jury a general instruction to the effect that if the plaintiff appreciating the danger and in obedience and in spite of the dangers known to him pushed the wedge under the stone with his hands, he was guilty of contributory negligence. The court had no right or business in the orderly trial of a case so to instruct or direct the jury while absent from the court and in the absence of the parties and their attorneys.

Fillippon v. Albion Vein Slate Co., 39 Supreme Ct. Rep. 435, p. 436.

EXERCISE OF CARE—FREEDOM FROM FAULT.

An employee of a coal company was engaged in delivering a wagon-load of coal to a quarry company at its quarry. While engaged in unloading the coal the quarry operators in the line of their work fired a blast that frightened the horses attached to the coal wagon and caused them to start to run away. The employee, in attempting to stop the team, received injuries for which he sued. He was not chargeable with such contributory negligence as to defeat his action, because, instead of taking hold of the lines to stop the team, he ran by the side and endeavored to stop the horses by the bridles. He was not a volunteer, but was acting in the line of his duty. His employment necessarily carried with it the duty on his part to protect the team and wagon from injury and if, in the light of the situation, an ordinarily careful and prudent man in charge of a team of horses belonging to his employer would have acted in a like manner, then the employee can not be held as a matter of law to have been guilty of contributory negligence, although his attempt to control the team in point of fact resulted in injury to himself.

Slinkard v. Lamb Construction Co., — Mo. App. —, 212 Southwestern 61, p. 64.

DAMAGES FOR INJURIES TO MINERS.

ELEMENTS OF DAMAGES.

ELEMENTS—PROOF OF DECREASED EARNING CAPACITY.

In an action by a miner for damages for injuries it appeared from the evidence that the complainant would "always have a weak arm." Under such evidence it was error for a court in its instructions to assume a decrease in the miner's earning capacity as it might be that the condition of the arm, weakened by the injury, would not necessarily decrease the miner's earning capacity. Under the evidence the fact of the decrease in the earning capacity of the miner was left to inference and argument.

Texas & Pacific Coal Co. v. Ervin, — Tex. Civ. App. —, 212 Southwestern 234, p. 235.

INJURY TO LEG.

The loss of a leg might in some instances work less incapacity for earning wages than an injury to the leg. The schedule of the Workmen's Compensation Act of Kansas allows for the loss of a leg fifty per cent of the average weekly wages during two hundred weeks. The act also provides that in case of partial disability not covered by the schedule a workman may receive during the period of partial disability not exceeding eight years sixty per cent of the difference between the amount he was earning prior to the injury and the amount he may be able to earn after such injury. In awarding damages for an injury to a miner's leg the court may be justified in following the latter provision.

Close v. Lucky OK Min. Co., — Kan. —, 182 Pacific 392, p. 393.

RELEASE—CONSIDERATION—QUESTION OF FACT.

At the time an employee of a coal company was engaged in unloading a wagonload of coal at a quarry the horses attached to the wagon were frightened by the firing of a blast nearby and started to run away. The employee in attempting to stop the team was injured. Subsequently the injured employee executed to his employer, the coal company, a release of all damages for a stated consideration. The release was a mere recital and was not contractual in a legal sense so as to deprive the injured employee of his right to show the actual consideration or the want of consideration for the signing of the release. It therefore was a question of fact to be

determined by the jury whether or not there was any consideration for the execution of the release.

Slinkard v. Lamb Construction Co., — Mo. App. —, 212 Southwestern 61, p. 63.

DAMAGES NOT EXCESSIVE.

NOT EXCESSIVE.

A verdict of \$4,000 does not of itself raise an inference that it was influenced by passion or prejudice on the part of the jury where the plaintiff, an injured miner, was compelled to undergo much suffering and the evidence tended to show permanent disability affecting two fingers of the right hand and other disabilities still continuing for nearly two years after the date of the accident.

Duran v. Yellow Aster Min. & Mill. Co., — Cal. App. —, 181 Pacific 395, p. 397.

EXPLOSIVES.

NEGLIGENCE—PRESUMPTION FROM ACCIDENT.

Proof that a residence was destroyed by fire from a natural gas explosion when a drip pipe in the basement was being cleaned was sufficient to justify a finding that the presumption of negligence from the happening of the accident stood un rebutted.

Willard v. Valley Gas & Fuel Co., — Cal. —, 182 Pacific 32, p. 33.

ACCESSIBILITY TO CHILDREN—ATTRACTIVE NUISANCE.

The owner of a quarry and rock crusher kept for use dynamite, fuses, and dynamite caps. The quarry and crusher were upon the rugged side of a hill and the dynamite, fuses, and caps were kept in a box some four feet high with the word "dangerous" printed thereon. The box containing the dynamite and caps was accessible from a path leading up the hill and it was known by the owner that children lived near and were accustomed to pass along the path and to gather about the quarry and crusher. A boy six years old held the lid of the box open with a piece of flooring board and another boy 12 years old reached into and took out the fuses and caps, and in playing with the fuses and caps the six year old boy was injured. Under these circumstances the case was not regarded as coming within the doctrine of attractive nuisance.

Goehenour v. Brown, — Kan. —, 180 Pacific 776.

UNEXPLODED SHOTS—LIABILITY.

A mine operator is liable to a miner for injuries caused by an unexploded shot left by a former shift that was working under an employee to whom superintendence had been entrusted.

Alabama Fuel & Iron Co. v. Smith, — Ala. —, 82 Southern 30, p. 31.

PROOF OF INSPECTION—ADMISSIBILITY OF CERTIFICATE.

Where oil was inspected in a tank car it was impractical for the inspector to mark and brand and date the package, but the practice was to furnish the data called for by the statute in the form of a certificate and deliver the same to the owner and proposed seller. In an

action against a seller of oil for damages for personal injuries caused by an explosion the certificate of the oil inspector was competent evidence as the seller presumptively had a right to act upon the certificate furnished him by the inspector.

Way v. S. L. Collins Oil Co., — Iowa —, 173 Northwestern 20, p. 22.

NEGLIGENCE—DEPOSITING HOT ASHES NEAR STORED NITROGLYCERIN.

A manufacturer of nitroglycerin and other high explosives may be guilty of negligence in removing fire, hot ashes and coals from its boiler and placing them near the inflammable material of its boiler house and by reason thereof the boiler house became ignited and caused the stored nitroglycerin and other explosives to explode to the injury of a person working nearby and who was himself without fault.

American Glycerin Co. v. Hill, 255 Federal 841.

CONTRACT FOR PURCHASE OF CAPS—DELIVERY—STATUTE OF FRAUDS.

A mine operator by its agent entered into a contract to purchase mining caps. On the delivery of the caps the mine operator himself refused to accept them but afterwards agreed to receive the caps upon an allowance of a certain per cent for culms. The modification of the contract and the acceptance of the caps as delivered was sufficient to take the original contract of purchase out of the statute of frauds.

Chamberlain v. W. J. Thompson & Co., — Mo. App. —, 213 Southwestern 946, p. 497.

STORING OILS—NUISANCE.

It is both a public and a private nuisance for an oil company to store oil, gasoline, kerosene, and other high explosives in warehouses and storage tanks in a thickly settled portion of a city.

McGuffey v. Pierce-Fordyce Oil Association, — Tex. Civ. App. —, 211 Southwestern 335, p. 337.

SALE OF GASOLINE FOR COAL OIL—DUTY TO PUBLIC.

It is the duty of a seller of gasoline and coal oil who knows the danger to the health and life incident to the attempted use of gasoline, or any other highly explosive substance similar to gasoline for illuminating purposes, not to sell the same as coal oil suitable for illuminating purposes. This duty the seller owes not only to his buyer, but knowing it is purchased for resale he owes the same duty to all who have occasion to purchase some of the substance.

Cohn v. Saenz, — Tex. Civ. App. —, 211 Southwestern 492, p. 494.

WHOLESALE OF OILS—DUTY AND LIABILITY.

A dealer in coal oil who sells to another with knowledge that the purchaser is buying the oil for resale at retail owes a duty to the purchaser and to the public to sell and deliver to the purchaser coal oil, and it was his duty not to deliver in lieu of coal oil a substitute exceedingly dangerous when used for purposes for which coal oil is commonly used. The law imposes upon every one the duty to avoid acts which are in their nature dangerous to the lives and health of others. This doctrine is applied in behalf of persons who have no contractual relation with the original dealer or manufacturer.

Cohn v. Saenz, — Tex. Civ. App. —, 211 Southwestern 492, p. 494.

INTERSTATE COMMERCE.

TRANSPORTATION OF NATURAL GAS.

The transportation of natural gas from one State to another is interstate commerce.

West Virginia & Maryland Gas Co. v. Towers, — Md. —, 106 Atlantic 265, p. 267.

See West v. Kansas Natural Gas. Co., 221 U. S. 229, 35 L. R. A. (N. S.) 1193.

NATURAL GAS—TRANSPORTATION THROUGH PIPES—DELIVERY TO CONSUMERS—ORIGINAL PACKAGE—STATE REGULATIONS.

Natural gas was imported from West Virginia into Maryland through what is termed a high-pressure line. Before being delivered to consumers the pressure was by means of a regulator reduced when it reached the gates of a community where it was to be distributed to the consumers, and it was then carried through the community in low-pressure mains with which the service lines connected. The pressure was again reduced at various stations before it entered the low-pressure mains with which the service lines were connected. The pressure was reduced because the pressure in the main pipe was too high for service to consumers, and by the reduction of the pressure it was separated from the other gas in the main pipe and forced into the intermediate lines; from thence it could not return to the main line but remained in such intermediate lines to be consumed as needed. Whether the gas was separated from the general bulk of gas and confined in the intermediate pipe lines, where it could not return to the main pipe line and where it must remain until consumed, or whether it was so separated and stored in tanks awaiting consumption, the effect is the same in determining the question whether the original package had been broken and the gas mixed with the common mass of property in the State of Maryland. The fact that there was a constant movement of the molecules of the gas because of the peculiar nature of the property does not affect the determination of the question. The gas before reaching the consumer passed through pipes laid in the streets, which was done under rights acquired from local authorities and also through pipes belonging to the owner of the premises upon which the gas was consumed. These facts aid in characterizing the transaction as being of a local and not of a national nature. When the gas was

separated from the bulk of gas in the high-pressure line and forced into the intermediate or low-pressure lines and then into the pipes of the individual consumers, where it could not return to the main line, but remained until it was used, it was such a breaking of the original package as to remove it from interstate commerce and to make it subject to State legislation and a subject of regulation by the public service commission of Maryland.

West Virginia & Maryland Gas Co. v. Towers, — Md. —, 106 Atlantic 265, p. 268.

See State v. Flannelly, 96 Kan. 372, 152 Pacific 22.

Pennsylvania Gas Co., In re, 184 App. Div. 556, 172 New York Supp. 1028.

Landon v. Public Utilities Comm. of Kansas, 242 Federal 658.

NATURAL GAS—"ORIGINAL PACKAGE"—APPLICATION.

By the term "original package" as used in interstate commerce it is not intended to limit the articles to those that are capable of being put in the form of a package in the generally accepted meaning of the word, but it may apply to other articles incapable of assuming the form of a package by reason of their physical properties. The term is properly applied to natural gas transported by pipe lines.

West Virginia & Maryland Gas Co. v. Towers, — Md. —, 106 Atlantic 265, p. 268.

PUBLICATIONS RELATING TO MINING LAWS.

A limited supply of the following publications of the Bureau of Mines has been printed and is available for free distribution until the edition is exhausted. Requests for all publications can not be granted, and to insure equitable distribution applicants are requested to limit their selection to publications that may be of especial interest to them. Requests for publications should be addressed to the Director, Bureau of Mines.

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BULLETIN 90. Abstracts of current decisions on mines and mining, December, 1913, to September, 1914, by J. W. Thompson. 1915. 176 pp.

BULLETIN 101. Abstracts of current decisions on mines and mining, October, 1914, to April, 1915, by J. W. Thompson. 1915. 138 pp.

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